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NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE BOARD OF EQUALIZATION OF THE STATE OF GEORGIA, *et al.*,
Petitioners,

v.

SOUTHERN RAILWAY COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May Congress forbid district courts from abstaining in cases otherwise within *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)?

2. In enacting § 306 of Pub. L. 94-210, 49 U.S.C. § 11503, did Congress intend to forbid abstention in cases brought by railroads to enjoin allegedly discriminatory state taxation of railroad property?

3. Assuming that § 306 does not absolutely bar abstention, did the district court nevertheless abuse its discretion in this case?

PARTIES

The parties to this Petition are the State Board of Equalization of the State of Georgia and Marcus E. Collins, Sr., Michael J. Bowers, Jimmy Lester, William M. Nixon, Jr., and Joe Mack Wilson, the current members of the Board, as Petitioners; Southern Railway Company, The Alabama Great Southern Railway Company, Central of Georgia Railroad Company, The Georgia Northern Railway Company, Georgia Southern & Florida Railway Company, Live Oak, Perry and South Georgia Railway Company, Tennessee, Alabama and Georgia Railway Company, Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company, and the United States of America, as Respondents.

In their Brief in the Court of Appeals the Respondent railroads listed, as parties having an interest in the outcome of this case, more than 200 subsidiaries and affiliates. Petitioners believe that these parties do not have a separable interest in the outcome of this case and are supplying their names in a letter addressed to the Clerk, rather than listing them here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, State Board of Equalization of the State of Georgia, Marcus E. Collins, Sr., Michael J. Bowers, Jimmy Lester, William M. Nixon, Jr., and Joe Mack Wilson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on September 19, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 715 F.2d 522 and appears as Part I of the Appendix hereto. The orders of the United States District Court for the Northern District of Georgia, dismissing the action and denying motions to reconsider, are not reported and appear as Parts II and III of the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 19, 1983, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (1976) ("§ 306"), insofar as it is directly pertinent to the abstention issue presented by this case, provides as follows:[1]

> It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or political subdivision to . . . [assess], for purposes of a property tax levied by any taxing district, [railroad] property at a value which bears a higher ratio to the true market value of such [railroad] property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property. * * *
>
> (2) Notwithstanding any provision of Section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunc-

[1] The complete text of § 306, including definitions and other material, appears as Part IV of the Appendix hereto. The text reproduced here and in the Appendix is the original statutory text, not the text codified in 1978 as 49 U.S.C. § 11503. Pub. L. No. 95-473, 92 Stat. 1337, 1445-46 (1978). The parties to this case and most courts, including the Court of Appeals below, agree that the original text is authoritative. Appendix 2a n.1.

tive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain or terminate any acts in violation of this section. . . ."

STATEMENT OF THE CASE

In October 1979, each of the Respondent railroads appealed the assessment of its Georgia property for tax year 1979 to the Petitioner State Board of Equalization and specifically claimed an entitlement to relief under § 306 as well as under state law. Each railroad agreed that the State Board had jurisdiction to grant relief based upon § 306, and actively litigated its § 306 cause of action before the State Board. The State Board's disposition of the § 306 and state law claims could have been appealed (and can still be appealed) to a single state court, with ultimate review of any federal question in this Court.

All of the railroads' property, wherever located in the State of Georgia, was encompassed in the State Board proceeding. A hearing on the appeal was held before a hearing officer whose appointment by the State Board was consented to by the railroads. The hearing lasted six days and produced a 1400 page transcript and voluminous exhibits. Extensive post-trial briefs were filed and the hearing officer ultimately rendered his proposed findings of fact and conclusions of law on January 5, 1981. The hearing officer recommended that the railroads be awarded relief on their state law equalization claims, but be denied relief on their state law valuation claims and their § 306 claims. The hearing officer denied the § 306 claims because the railroads presented no evidence on the assessment ratios of commercial and industrial property, the comparison class of property specified by § 306.

The state and the railroads both filed exceptions to the hearing officer's proposed findings and conclusions.

The state in its exception argued that a December 1980 decision of the Georgia Supreme Court, *Strickland v. Douglas County*, 246 Ga. 640, 272 S.E.2d 340 (1980), approved the state's annual tax equalization procedure, making it clear that the railroads were not entitled to an additional adjustment in the State Board proceeding. The railroads in their § 306 exception argued that a tax district's "all property" assessment ratio (the ratio determined by examining assessments of all types of locally assessed real property in a jurisdiction) is conclusively presumed by state law to be the same as its "commercial and industrial" assessment ratio (the ratio determined by examining assessments of non-railroad commercial and industrial property in a jurisdiction).

The State Board met on April 14, 1981, to hear arguments of counsel, then adjourned and reconvened on April 15. The State Board applied *Strickland v. Douglas County, supra*, and accordingly denied the railroads relief on the state law equalization claims. The remaining recommendations of the hearing officer were adopted. With respect to the § 306 claims, the State Board concluded that there was no state law presumption equating "all property" ratios with "commercial and industrial" ratios, and accordingly concluded that the railroads had presented no evidence under § 306.

About an hour after the State Board voted on its decision, and before a written order was prepared, the railroads filed suit in the United States District Court for the Northern District of Georgia, seeking declaratory and injunctive relief against alleged violations of § 306. Jurisdiction was predicated upon 28 U.S.C. § 1331, 28 U.S.C. § 1337, and § 306 itself. The railroads moved for a temporary restraining order, relying in part upon the

supposed state law presumption that had just been argued before the State Board. A temporary restraining order was entered, and the State Board has from that moment been enjoined from issuing its written order.

The State Board in its answer raised, *inter alia*, defenses based upon abstention and the Tenth Amendment.[2] The United States moved to intervene on June 8, 1981, to sustain the constitutionality of § 306 and to enjoin practices alleged to violate § 306. Intervention was ordered on June 13, 1981, and the State Board answered the complaint of the United States on June 14, raising the same defenses raised in its answer to the railroads' complaint.

On May 26, 1981, the State Board moved to dismiss the case on the grounds that the District Court should abstain from exercising its jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and its progeny. On August 27, 1981, the district court entered its Order (reproduced as Part II of the Appendix hereto).

The District Court discussed the particular facts and circumstances of the case in detail, finding that state court review of the § 306 claim would be adequate, Appendix 31a, and indeed that the type of review available to the railroads had been specifically approved for abstention purposes by *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 349 (1951). Appendix 24a n. 2. The District Court found that taxation is one of the most basic functions of state and local government, Appendix 30a, and that a federal court injunction

[2] A Tenth Amendment issue was being litigated at the time by the State of Tennessee but was later effectively resolved in favor of § 306. *State of Tennessee v. Louisville & Nashville R.R.*, 478 F.Supp. 199 (M.D. Tenn. 1979), *aff'd* 652 F.2d 59 (6th Cir.), *cert. den.* 454 U.S. 834 (1981).

would unnecessarily intrude into state property tax administration. Appendix 31a.

The District Court found that Georgia law mirrors federal law in requiring that railroad property be taxed uniformly with other property (including commercial and industrial property), and that therefore the dispute was essentially over opinions of value. Appendix 28a. With respect to questions of property valuation, the District Court found that the state possesses special expertise, Appendix 31a, and that a state court could more effectively require compliance with § 306 because of the limits placed upon district court assessing activities by *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). Appendix 32a-33a.

With respect to the § 306 cause of action, the District Court noted that jurisdiction of § 306 cases lies concurrently in state and federal court, Appendix 30a, and that the railroads had voluntarily elected to pursue their § 306 claim on the merits in a state forum prior to filing suit in district court. Appendix 32a. In the exercise of its discretion, the District Court concluded that abstention was proper and dismissed the case in favor of the ongoing state proceedings. Appendix 33a.

Motions to reconsider were filed by all parties and denied on October 9, 1981 (order reproduced as Part III of the Appendix hereto). The State Board objected to continuation of the temporary injunction pending appeal, on the ground that the railroads should be required to pay their undisputed tax liability. Appeals followed, and on September 19, 1983, the United States Court of Appeals for the Eleventh Circuit reversed the District Court on both the appeal and cross-appeal. The Court of Appeals in its opinion (reproduced as Part I of the Appendix

hereto) held that *Burford* abstention is barred in § 306 cases, Appendix 9a, and therefore did not find it necessary to discuss disruption of state taxation, state expertise, adequacy of state court review, or most of the other *Burford* factors considered by the district court. The Court of Appeals found that Congress intended to carve out an exception to the doctrine of equitable restraint in cases brought pursuant to § 306. Appendix 14a. The Court of Appeals stated that the province of the judiciary in this area is to implement congressional policy, Appendix 14a, as opposed to "its own notions of comity and federalism." Appendix 16a n. 14.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' conclusion, that *Burford* abstention involves nothing except congressional policy, is in conflict with principles stated in decisions of this Court, a conflict which is of sufficient importance to warrant review by this Court.

In its opinion, the Court of Appeals below concluded that a district court may not abstain unless doing so is consistent with congressional intent. This conclusion is in conflict with a half century of Supreme Court jurisprudence and is important enough to call for review and correction by this Court.

a. Conflict with principles stated in Supreme Court decisions.

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943), this Court held that federal district courts may decline to exercise their jurisdiction to enjoin certain state activities, and thereby make their own contribution to the "harmonious relation between state and federal authority." The dissenters advanced the idea that the province

of the judiciary in determining whether to abstain is simply to implement congressional policy:

> "The duty of the judiciary is to exercise the jurisdiction which Congress has conferred. What the Court is doing today I might wholeheartedly approve if it were done by Congress." 319 U.S. at 348 (Frankfurter, J., dissenting).

The majority disagreed, holding that courts may exercise their equitable powers to give "proper regard for the rightful independence of state governments in carrying out their domestic policy," *Id.* at 318, and therefore are not limited to congressional policy in determining whether to exercise jurisdiction in a particular case.

Subsequent cases have confirmed that the judiciary has an independent role to play in this area, and should consider nonstatutory matters, including comity and federalism, in determining whether or not to abstain. *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981). Indeed, a commentator has stated that Justice Frankfurter apparently abandoned his position in *Burford* when, writing for the Court in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959), he recognized state autonomy as a basis for sustaining a district court which had abstained. *See* Comment, "Scope of the Burford Doctrine," 46 U.Chi. L.Rev. 971, 989-90 n. 104 (1979).

Despite these authorities, the Court of Appeals below concluded that if Congress intended to offer a suitor a choice of forum then a district court may not decline to exercise its jurisdiction. According to the Court of Appeals, it is an abuse of discretion to consider comity and federalism or to weigh the extent to which a district

court injunction would disrupt state activities, displace state expertise and preempt adequate state court review of an issue. The opinion below states its absolutist view of this matter three times: "we conclude that the statute bars abstention," Appendix 9a; "Since Congress has spoken, it is not our province to alter the balance Congress struck," Appendix 14a; "We conclude that the recent, specific expression of congressional intent and national policy reflected in [§ 306] requires federal courts to hear [§ 306] cases brought before them." Appendix 16a-17a.[3]

The Court of Appeals attempted to reconcile its decision with *Fair Assessment in Real Estate Association v. McNary, supra*, a recent decision of this Court which approved abstention in a § 1983 challenge to state property tax assessment practices. The State Board submits, however, that the decision below is in clear conflict with *Fair Assessment*. The Court of Appeals interpreted *Fair Assessment* in terms of the strength of the congressional policy favoring a federal forum to adjudicate that particular variety of civil rights suit. The Court of Appeals stated that *Fair Assessment* approved abstention because the economic due process claims in *Fair Assessment* "fell at the extreme periphery of the concern behind section

[3] Two footnotes seem to state a contrary rule: "We refuse to accept . . . the railroad's argument that the courts are prevented from exercising equitable discretion because of a contrary expressional of congressional intent." Appendix 11a n. 12; "This case presents no compelling reason for the court to ignore Congress' intention," Appendix 16a n. 14 (suggesting that such reasons might exist). Moreover, the opinion below states generally that equitable restraint may continue to justify abstention in state tax cases falling outside of the Tax Injunction Act of 1937, 28 U.S.C. § 1341. Appendix 10a-11a. However, in light of the Court of Appeals' refusal to even discuss most of the factors considered by the District Court, it is fair to say that the Court of Appeals concluded that abstention is absolutely barred unless Congress has at least acquiesced in it.

1983," Appendix 15a, but this Court's opinion provides scant support for the Court of Appeals' interpretation. Indeed, if *Fair Assessment* were really limited to the intent of Congress then most of this Court's discussion was pointless. In refusing to dispose of *Fair Assessment* under the Tax Injunction Act of 1937, 28 U.S.C. § 1341, this Court took special care to establish that comity and federalism are always to be considered in *Burford* abstention cases, irrespective of whether the statutory indications favor or disfavor abstention.

Moreover, the opinion below conflicts in principle with *Alabama Public Service Commission v. Southern Railway Co., supra*, a case principally relied upon by the State Board but not cited by the Court of Appeals. In its discussion, the Court of Appeals noted that § 306 contains a specific exception to 28 U.S.C. § 1341. Appendix 6a, 12a. Largely because of this exception, the Court of Appeals found that "Congress meant unconditionally to ensure a federal forum for section [306] claims." Appendix 9a. Viewing this intent as dispositive, the Court of Appeals concluded that § 306 "bars abstention." *Id.*

It is true that the exception to 28 U.S.C. § 1341 distinguishes § 306 from the provisions of law involved in *Burford* and *Fair Assessment*, but *Alabama Public Service Commission v. Southern Railway Co., supra*, establishes that abstention is not barred by enactments similar to § 306. Southern Railway filed suit in district court to enjoin enforcement of an order of the Alabama Public Service Commission denying Southern a permit to reduce passenger service on an allegedly unprofitable route. Finding state law violations and out-of-pocket losses amounting to confiscation of property in violation of the Due Process Clause of the Fourteenth Amendment, a

three-judge court entered judgment voiding the Commission's order and enjoining any action against Southern for discontinuing trains. The district court gave scant attention to the Commission's motion to dismiss based upon *Burford* abstention, holding that "rules of comity are inapplicable" in that type of case. *Southern Railway Co. v. Alabama Public Service Commission*, 91 F.Supp. 980, 985 (M.D. Ala. 1950) (three-judge court).

The Commission appealed and argued, *inter alia*, that the district court was required to abstain under *Burford v. Sun Oil Co.*, *supra*. Southern responded by discussing Congress' detailed restriction of federal court injunctions,[4] reasoning in effect that Congress, by restricting the ability of district courts to enjoin certain actions, impliedly commanded district courts to exercise their jurisdiction in cases falling outside of the restrictions. The strongest negative inference arose from the Johnson Act, 28 U.S.C. § 1342, which abridged district court jurisdiction to enjoin the rate orders, but not the service orders, of state public service commissions. This Court, however, concluded that abstention was not precluded:

> The Johnson Act, 48 Stat. 775 (1934) now 28 U.S.C. (Supp. III) § 1342, does not affect the result in this case. That Act deprived federal district courts of jurisdiction to enjoin enforcement of certain state administrative orders affecting public utility rates where "A plain, speedy and efficient remedy may be had in the courts of such State." As the order of the Alabama Service Commission involved in this case is not one affecting appellee's rates, the Johnson Act

[4] Southern referred to 28 U.S.C. § 1341, 28 U.S.C. § 1342 and 28 U.S.C. § 2284. *See* Brief for Appellee at 28-29 in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 363 (1951), a companion case. This argument was incorporated by reference into Southern's brief in the principal case.

> is not applicable. We have assumed throughout this opinion that the court below had jurisdiction, *supra*, p. 345, but hold that jurisdiction should not be exercised in this case as a matter of sound equitable discretion. 341 U.S. at 350.

The 28 U.S.C. § 1342 argument rejected in *Alabama Public Service Commission v. Southern Railway Co., supra*, is virtually identical to the 28 U.S.C. § 1341 argument accepted by the Court of Appeals below, making clear the conflict in principle between the two decisions.

The foregoing review of *Burford* abstention cases suggests that district courts considering abstention should not passively implement congressional policy, and that the Court of Appeals' decision to the contrary is in conflict with a half century of Supreme Court jurisprudence. However, the Court of Appeals cites two decisions of this Court, *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), Appendix 14a-16a, so it should be made clear that these decisions did not resurrect the position of the *Burford* dissenters.

Patsy held that the exercise of federal jurisdiction in § 1983 cases would not be deferred pending exhaustion of state administrative remedies, and did so largely because deferral would be inconsistent with legislative intent. However, this Court also recognized as a matter of principle that exhaustion requirements could be imposed by the judiciary. *Id.* at 501. Moreover, deferral is substantially different from dismissal, the result of *Burford* abstention. *Patsy* does not indicate any general dissatisfaction with *Burford* abstention, or even with dismissing § 1983 cases on grounds of abstention, as was ordered in *Fair Assessment in Real Estate Association v. McNary, supra.*

In *Moe*, according to the Court of Appeals, a jurisdictional statute "properly took precedence over the equitable restraint doctrine," leading this Court to decide "that abstention in the case was improper." Appendix 15a. In rereading *Moe*, however, the State Board was unable to find any mention of equitable restraint or abstention in the opinion of this Court or in either of the trial court decisions. *See* 392 F. Supp. 1297 and 392 F. Supp. 1325. The State Board submits that *Moe* provides no support for the Court of Appeals' notion that jurisdictional statutes may preclude district courts from abstaining in appropriate cases.

b. Importance of the issue.

The decision of the Court of Appeals undermines the entire concept of abstention. Apparently for the first time, a federal appellate court has instructed the district courts in its circuit that it is an abuse of discretion to fail to passively implement congressional policy. The decision prohibits a district court from considering "its own notions of comity and federalism," Appendix 16a n. 14, in determining whether or not to abstain.

The approach of the decision below is, by its nature, not limited to § 306 or *Burford* abstention. If district courts must disregard comity and federalism in this context, then, by a parity of reasoning, they must disregard comity and federalism in other contexts as well. The Court of Appeals stated that its approach applies to "abstention in all its forms," Appendix 14a, and it is to be expected that, as precedent in the Eleventh Circuit and persuasive authority elsewhere, the Court of Appeals' decision will be applied as written.

The Court of Appeals' decision represents a radical departure from principles established by this Court to

govern one of the most sensitive aspects of our constitutional system. Acceptance of the Court of Appeals' approach will prevent the judicial branch of government from making its own contribution to the "harmonious relation between state and federal authority," *Burford v. Sun Oil Co., supra,* 319 U.S. at 333, in an area of long-standing and deep concern to this Court.

Even if the decision below could somehow be limited to § 306 cases, this case would nevertheless warrant Supreme Court review. As the first appellate decision on this important aspect of § 306, the decision below will likely be followed in other circuits. The Court of Appeals acknowledged that § 306 cases, while they may only be filed by owners of rail transportation property, are apt to involve large amounts of revenue. Appendix 13a. The case *sub judice* involves only a single state and a single tax year, but still encompasses railroad property located in Georgia valued at more than $478 million and a disputed principal tax liability of $1.5 million. Railroads have filed § 306 cases in more than 20 states [4] and new

[4] As the Court of Appeals noted, Appendix 17a n. 15, several district courts in other circuits have considered abstention in § 306 cases. While most of the courts have declined to abstain, this does not indicate disagreement with abstention in the case *sub judice*. *Atchison, T. & S.F. Ry. v. Lennen*, 552 F.Supp. 1031 (D. Kan. 1982), while listed by the Court of Appeals below as the one case "disapproving" the district court order below, actually found the Georgia order only to be inapplicable to "the circumstances of this case." *Id.* at 1038. The Kansas District Court based its decision upon Kansas's status as a severe historical discriminator, *Id.* at 1037, which precludes the use of sales ratio data, *Id.* at 1048 n. 14, and provides extremely limited state law equalization. *Id.* at 1036. Most importantly, the court found Kansas to offer railroads state court review which is "uncertain at best." *Id.* at 1038. The Kansas District Court's careful consideration of abstention factors is inconsistent with the absolutist rule announced by the Court of Appeals below, and does not criticize, much less find an abuse of discretion by, the District Court below.

suits will tend to appear in annual waves because property tax assessment is an annual process. All of these factors suggest that the potential for federal-state friction in § 306 litigation is very great and warrants the grant of the writ.

2. The Court of Appeals' conclusion, that Congress intended to forbid abstention in § 306 cases, is clearly in error and is of sufficient importance to warrant Supreme Court review.

The Court of Appeals gave two reasons for concluding that Congress intended to forbid abstention in § 306 cases, but such a conclusion follows neither from Congress' suspension of 28 U.S.C. § 1341, Appendix 12a, nor from the legislative history. Appendix 14a. The Court of Appeals' decision represents the first construction by an appellate court of this aspect of this important legislation, and warrants Supreme Court review.

The negative inference from 28 U.S.C. § 1341 is a poor guide to the legislative intent respecting abstention because the standards for 28 U.S.C. § 1341 and abstention, while they both involve adequacy of state review, are markedly different in other respects. Unlike 28 U.S.C. § 1341, abstention is discretionary and involves consideration of a variety of additional factors which may vary from case to case. Moreover, a similar inference was involved in *Alabama Public Service Commission v. Southern Railway Co.*, *supra*, and rejected entirely by this Court. *Supra* at 10-12.*

* If a negative inference is to govern this case, it would be better to draw it from the phrase "Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any state," taken as a whole. By specifically naming three sources of law, the quoted phrase impliedly excludes others, includ-

It is impossible in a petition for certiorari to discuss in detail the voluminous 15-year legislative history of § 306 and its forerunner bills. Suffice it to say that the Court of Appeals, while citing to legislative reports elsewhere in its opinion, gives no citation for its conclusion that Congress intended to preclude abstention in § 306 cases. Indeed, the railroads have never suggested that a reference to abstention appears anywhere in the history, and the State Board believes there is none.

On the contrary, the legislative history indicates that Congress was primarily concerned with the practice of some states of requiring a railroad to file suit in dozens of jurisdictions in order to adjudicate its claim:

> "Access to the Federal courts to obtain relief from acts declared to be unlawful by the measure is a secondary, but necessary, part of the measure. Carriers are necessarily located in many taxing jurisdictions. Without this measure's provision for action in the Federal district courts, they might be required to bring a multiplicity of suits to obtain justice." S. Rep. 92-1085 at 8.

Congress noted that the Southern Pacific and its affiliates were required to bring 48 separate suits in 48 separate California superior courts to challenge the level of assessment of its railroad property, and that burdensome multiple suit requirements are often held not to violate the "plain, speedy and efficient" requirement of 28 U.S.C. § 1341. *Id.* at 5. This problem, however, has not existed in Georgia at least since 1966, when *Undercofler v. Seaboard Air Line Railroad Co.*, 222 Ga. 822, 152 S.E.2d 878 (1966), granted a major railroad statewide equaliza-

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ing abstention. If Congress had intended to foreclose abstention in § 306 cases it presumably would have said so in the quoted phrase. *See American Bank and Trust Co. v. Dallas County*, 463 U.S. ___ (1983) (slip op. at 8).

tion relief in a single proceeding. Under the current Georgia statute it is clear that this entire litigation would be heard in a single proceeding. *See* Off. Code Ga. Ann § 48-2-18(e) (1983).

Congress was also concerned with *de jure* discrimination against railroad property, *Id.* at 6 (the District Court concluded that this was Congress' principal concern, Appendix 31a), and with unreasonable standards of proof and ineffective remedies in state court equalization proceedings. None of these problems exists in Georgia, a uniform taxation state which has for many years recognized ratio study evidence and adjusted railroad assessments in the same manner as § 306. *See Undercofler v. Seaboard Air Line Railroad Co., supra.*

A railroad industry witness once suggested that state courts may be reluctant to disagree with assessors, S. Rep. 91-630 at 7, but this cannot be characterized as one of Congress' central concerns and there is in any event no basis to apply it to Georgia. The District Court found that state judicial review would be adequate in this case. Appendix 31a. The railroads have not disputed this finding or pointed to a single instance in which they contend railroad property was improperly valued, or equalization was improperly denied, in a Georgia state court proceeding.

The decision of the Court of Appeals is the first construction by an appellate court of this aspect of this important legislation. The construction ignores the approach of this Court in *Alabama Public Service Commission v. Southern Railway Co., supra,* and is inconsistent with the legislative history. The likely effect of this misconstruction on subsequent cases, in the Eleventh Circuit and in other circuits, warrants the grant of the writ.

3. The District Court did not abuse its discretion in abstaining under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Analyzing the case *sub judice* in terms of the factors set forth in *Burford v. Sun Oil Co., supra*, and its progeny, there is no basis for concluding that the District Court abused its discretion. The Court of Appeals did not take issue with the District Court's detailed and careful weighing of the *Burford* factors, except in the following comment in a footnote to its opinion:

> "This case presents no compelling reason for the court to ignore Congress' intention and refuse to exercise its duly conferred jurisdiction." Appendix 16a n. 14.

As to what the Court of Appeals would consider to be a "compelling reason," properly cognizable by a district court, perhaps the Court of Appeals regards an injunction against state taxes as insufficiently disruptive to support abstention, even where, as here, the injunction allowed the railroads to retain over $4 million in undisputed principal tax for more than two years,[7] and has delayed an adjudication on the $1.5 million in principal tax that is in issue.

It is difficult for the State Board to conceive of a more disruptive injunction, and even the Court of Appeals conceded the importance of tax revenues to state and local governments. Appendix 10a. Moreover, a failure to abstain in Georgia could lead to recurring suits in state and federal court for a single year, as the lowering of rail-

[7] State law requires all taxpayers to pay past due undisputed amounts prior to filing suit in state court. Amounts in dispute are not required to be paid. Off. Code Ga. Ann. § 48-2-59(c). This procedure is fair to taxpayers but minimizes disruption of state and local government.

road taxes by federal court order, based upon its evaluation of the experts' opinions, could give rise to a new claim in other taxpayers to have their taxes equalized under state law. Then the railroads could return to federal court for a readjustment, and so on. Disruption is an important factor under *Burford v. Sun Oil Co.*, *supra*, and the foregoing process would be disruption with a vengeance.

Perhaps the Court of Appeals feels that state expertise in the area of property taxation would be matched by its district court judges. The opinion of the Court of Appeals, however, gives no hint of the extraordinary complexity of valuing the property of a major railroad, or of the difficulty of determining the prevailing level of assessment in hundreds of local taxing jurisdictions. The district court, in contrast, made specific reference to the 1400 page transcript, voluminous exhibits and extensive briefs filed with the State Board. Appendix 25a. Moreover, it is not clear that the Court of Appeals understood that the railroads intend to rely upon a supposed presumption of state law in order to prove their § 306 case, and have raised pendent state law claims. The existence of state law issues is a factor favoring dismissal of a federal suit in favor of state proceedings. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 820 (1976); *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963).

The Court of Appeals did disagree with the District Court that *Moses Lake Homes, Inc. v. Grant County*, *supra*, renders a federal court less effective than a state court as a § 306 forum. Appendix 8a n. 9. The State Board submits that this case involves the precise evil condemned in *Moses Lake Homes*, and notes that when

§ 306 and its forerunner bills were pending in Congress the Justice Department agreed with the District Court, advising Congress three times that partial injunctions under § 306 would probably be unconstitutional. *See* S. Rep. No. 1483 at 16-17; S. Rep. No. 91-630 at 19. Congress ignored the warnings and § 306 contains the feature found objectionable by the Justice Department.

Finally, it should be noted that the decision of the Court of Appeals gives railroads a right to two independent trials on a single cause of action. Witnesses and litigation strategies can be test-run before the State Board, and then reused or abandoned in federal court if the state administrative results do not suit the railroads. The Court of Appeals suggested that this incredibly wasteful procedure "will serve the principles of comity" because a satisfactory result before the State Board would probably obviate the federal suit, Appendix 5a n. 6. The state, however, does not feel accommodated by a rule which gives its litigation opponents two bites at the apple. The error of the Court of Appeals, in finding an abuse of discretion on the part of the District Court, is clear and substantial and this warrants the grant of the writ.

CONCLUSION

For the reasons stated, we respectfully request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Petition for a Writ of Certiorari upon counsel for all parties who are separately represented, pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, by mailing three copies to each in envelopes addressed to:

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with first-class postage prepaid. All parties required to be served have been served.

This ____ day of _____, 1983.

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APPENDIX

PART I

APPELLATE COURT DECISION

SOUTHERN RAILWAY COMPANY, et al., Plaintiffs-Appellants, Cross-Appellees,

United States of America, Plaintiff-Appellant,

v.

STATE BOARD OF EQUALIZATION, etc., et al., Defendants-Appellees, Cross-Appellants.

No. 81-7925.

United States Court of Appeals, Eleventh Circuit.

Sept. 19, 1983.

Appeals from the United States District Court for the Northern District of Georgia.

Before FAY and VANCE, Circuit Judges, and ALLGOOD*, District Judge.

VANCE, Circuit Judge:

In this case we are asked to decide whether the district court properly abstained from hearing a case brought before it under section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 31, 54 (1976) (codified with some differences in

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

language at 49 U.S.C. § 11503) (the 4R Act or the Act).[1] That provision prohibits a state or subdivision thereof from assessing rail transportation property at a value that has a higher ratio to the true market value of that property than does the assessed value of other commercial and industrial property in the state or subdivision. Section 11503 of the codified 4R Act also makes it unlawful to levy or collect taxes on rail property assessed in this discriminatory manner. The section confers concurrent jurisdiction on federal district courts to enforce its provisions.

---

[1] Section 306 of the 4R Act was originally codified in the Interstate Commerce Act at 49 U.S.C. § 26c. Although the Act became law on February 5, 1976, the effective date of section 306 was set for three years after that date to give the states time to bring their property tax laws into conformity with the Act. Pub.L. No. 94-210, 90 Stat. 31, 54 (1976) (originally codified at 49 U.S.C. § 26c(2)(b)). In the intervening period the Revised Interstate Commerce Act of 1978, Pub.L. No. 95-473, 92 Stat. 1337 (1978) recodified subtitle IV of the Interstate Commerce Act placing section 306 of the 4R Act at 49 U.S.C. § 11503. 92 Stat. at 1337, 1445-46. Despite the recodification's major changes in the wording of section 306 the stated legislative purpose of the Revised Interstate Commerce Act was to make changes in terminology and style without causing any substantive change. H.R.Rep. No. 1395, 95th Cong., 2d Sess. 9-10, *reprinted in* 1978 U.S. Code Cong. & Ad.News 3009, 3018-19. *See also* H.R.Rep. No. 1395 at 8, *reprinted in* 1978 U.S.Code Cong. & Ad.News at 3017 (letter of Edward F. Willett, Jr., Law Revision Counsel, placed in the report by Committee Chairman Rodino):

> Under the proviso of section 204(a) of title 1, positive law titles of the United States Code are legal evidence of the law. Even if the language used in the codification *appears* to make a substantive change, the courts will look to the predecessor statute and legislative history if necessary to interpret the language of the codification.

(emphasis in original). We shall read section 11503 in light of section 306 and the legislative history resolving ambiguities in favor of the original language. *Cf. Atchison, T. & S.F. Ry. v. Lennen*, 640 F.2d 255, 258 (10th Cir.1981). The approach fulfills the purpose of the recodification which was to attain uniformity within the title and reduce awkward and obsolete terms without affecting the substance of any previously enacted statutes.

I. Preliminary Matters.

The private appellants in this case are nine interstate rail carriers (the railroads) owning property in the state of Georgia.[2] Relying on a sales ratio study prepared by the Georgia Department of Audits which showed that, in the aggregate, local nonrailroad property in many Georgia counties in 1979 was preferentially assessed at a value far below the forty percent of fair market value required by state law the railroads brought this action in federal district court to enjoin the issuance by the Georgia State Board of Equalization (the state board) of an order which allegedly would result in the assessment of their property in a discriminatory manner.

Prior to bringing this suit the railroads appealed their proposed assessments for 1979 to the state board under the procedure Georgia provides for that purpose. *See* Ga.Code Ann. § 48-2-18 (1982), *amended by* § 48-2-18 (Supp.1983); Ga.Code Ann. § 48-2-46 (1982).[3] The designated hearing examiner rejected claims made by some of the railroads that their property was valued far in excess of its true market value but found on the basis of the sales ratio study that many counties discriminatorily assessed local nonrailroad property below the forty per-

[2] In its answer to the railroads' complaint the state board challenged the constitutionality of section 11503. Consequently the United States requested and was granted leave to intervene pursuant to 28 U.S.C. § 2403(a) (1976) in order to defend the Act. After the United States intervened the state board abandoned its direct attack on the Act's constitutionality. This abandonment is, however, partial. The state board still argues that under *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961), a federal court cannot constitutionally grant the relief mandated by the Act.

[3] In 1982 Georgia recodified its laws. Although at all times relevant to this appeal the old code was in effect, for convenience all citations to Georgia laws are to the new condification. Any discrepancies between the old and new codes are not relevant to this appeal.

cent of true market value required by law. As a consequence, the examiner recommended that the assessment percentages applied to each railroad's system value be reduced correspondingly in those counties.[4]

On April 15, 1981, in summary fashion, the state board approved and accepted all recommendations of the examiner except those which would eliminate the disparity between locally assessed property and rail property in the counties where the ratio study showed locally assessed property to be undervalued. The board gave no reasons for this rejection but implicitly ruled that, despite the significant discrepancies evidenced by the sales ratio study, the county assessments were "reasonably uniform" under Georgia law.[5] After the board announced its de-

[4] In his report and recommendation the hearing examiner discussed section 306 of the 4R Act but found it inapplicable because "[t]he railroads offered no evidence of the prevailing level of assessment of commercial and industrial property in the State as a whole or in any county. Absent such evidence the prevailing level of assessment for such property as a discrete class is presumptively at 40% of value. *Hardin v. Reynolds*, 189 Ga. 534, 6 S.E.2d 328 (1939). Hence, the discrimination prohibited by 49 U.S.C. § 11503 has not occurred." Thus the hearing examiner based his recommendation of equalization, which the state board refused to adopt, not on federal law but on state law. We further note that section 11503 may shift the burden to the state to show that all other commercial and industrial property was properly assessed after presentation of the sales assessment ratio showing the railroad's assessment value exceeded that of all other property. *See Clinchfield R.R. v. Lynch*, 700 F.2d 126, 132-34 (4th Cir. 1983). Regardless of the possibility of burden shifting, where a more specific ratio study is unavailable, a general ratio such as the one used by the railroads in this case showing a five percent assessment discrepancy is a sufficient ground for jurisdiction although not necessarily conclusive of the actual discrepancy existing or the measure of relief to be granted if adequately rebutted by the state board. *See Clinchfield R.R. v. Lynch*, 527 F.Supp. 784 (E.D.N.C.1981), *aff'd*, 700 F.2d 126 (4th Cir.1983).

[5] It is unclear under Georgia law what percentage discrepancy between railroad assessments and the average assessment of all other commercial and industrial property within a taxing subdivision would be sufficient to show as a matter of law that the railroads deserved equalization.

cision but before it could issue an order the railroads filed this action.[6] The district court's subsequent restraining orders and injunctions continue to prevent the board from issuing its order assessing the railroads property taxes.[7]

II. Property Tax Assessment in the State of Georgia.

The Georgia state revenue commissioner assesses utilities including railroads centrally. *See* Ga.Code Ann. §§ 48-5-510 through -524 (1982). Other commercial and industrial property is assessed by the county in which it is located. These local assessments are performed by the various county boards of tax assessors. *See* Ga.Code Ann. §§ 48-5-290 through -313 (1982 & Supp.1983). The state

[6] The fact that the state proceeding was still in progress when appellants sued in federal district court does not affect the district court's jurisdiction. *See, e.g., Colorado River Water Conservation Dist.*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976); *Ramos v. Lamm*, 639 F.2d 559, 565 (10th Cir.1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). The state board argues that the railroads should be confined to the state forum because that is where they chose to raise the section 11503 claim. The railroads argue that, under *Missouri Pacific Railroad v. Tax Division*, 504 F.Supp. 907 (E.D.Ark.1980), they feared their section 11503 claim would otherwise be deemed waived. The combination of the election of remedies doctrine advanced by the state board and the possibility of waiver under *Missouri Pacific* would effectively deprive federal courts of jurisdiction to hear section 11503 cases contrary to congressional intent. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-50, 94 S.Ct. 1011, 1019-1020, 39 L.Ed.2d 147 (1974) (Title VII cause of action not forfeited by arbitration of grievance under nondiscrimination clause of collective bargaining agreement). Although we need not decide the waiver issue we conclude that the railroads are not barred from advancing their claims by the doctrine of election of remedies and may proceed in federal court despite raising the identical claims in a state proceeding. This result will serve the principles of comity by encouraging railroads to bring all their tax claims first in the state tribunal. This may, if effective relief is forthcoming, eliminate the necessity for federal adjudication.

[7] Since no final order has been issued the board's determination of the section 11503 issue is not res judicata and does not bind the district court.

revenue commissioner by law must require all counties to assess property uniformly. *Hawes v. Conner*, 224 Ga. 567, 163 S.E.2d 724, 726 (1968). The degree of uniformity required is styled "reasonable uniformity." *See Strickland v. Douglas County*, 246 Ga. 640, 272 S.E.2d 340, 342 (1980). The commissioner's decision that assessments within a given county should be increased, decreased or left unchanged must be upheld by reviewing courts unless the action is "unreasonable, beyond his authority or constitute an abuse of discretion." *Id.*

III. Protections Afforded Railroads by the 4R Act.

Section 11503 grants federal courts concurrent jurisdiction to impose sanctions once a railroad shows that the ratio of assessed value to true market value of its property exceeds by at least five percent the assessed value to true market value of other commercial and industrial property within the taxing jurisdiction. Once this five percent jurisdictional threshold has been met the Act requires the court to enjoin the assessment of discriminatory taxes in any amount. The district court has explicit jurisdiction to issue injunctive relief notwithstanding the Tax Injunction Act of 1937, 28 U.S.C. § 1341.[*]

IV. The Case Below.

The district court observed that Georgia law requires uniform valuations of all property and described in detail Georgia's appellate procedure in property tax cases. The court then distinguished this situation from 4R Act cases involving de jure discrimination, observing that "there is

[*] 28 U.S.C. § 1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

no conflict between the Georgia Revenue Code and section 306." The court further noted that "any contention by the railroads that the State Board of Equalization misapplied either federal or state law as such law relates to the tax structure imposed on the railroads would be without merit, since state law requires, and the State Board of Equalization so recognized, that uniformity of taxation is required."

After noting that the state board had considered state and federal directives "that railroad property must be treated equally with commercial and other industrial property," the court observed that the railroads' complaint did not allege "any sinister plot on the part of the State Department of Revenue to circumvent either section 306 or the Georgia statutes by purposefully valuing their properties at a value higher than the actual true market value; the complaint merely alleges that the valuations and resulting assessments are incorrect. Thus narrowed, the focus of the railroads' complaint is whether the valuation placed upon their property is, indeed, the fair market value."

The district court concluded that abstention was proper under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). It justified restraint by noting that federal intervention could disrupt effectuation of the state policy of uniform taxation which in this case parallels federal law. The state's special expertise in valuation and assessment, the matter at hand, was also of relevance. The court added as a third reason for its abstention "the fact that protracted litigation could result because . . . the remedy which this court can provide is severely limited."[9]

[9] The district court concluded that restrictions on the power of federal courts to assess or levy taxes under *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961), "seri-

V. The Appeal.

A. *Burford* abstention in general.

" 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to ajudicate a controversy properly before it.' " *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-63, 3 L.Ed.2d 1163 (1959)); *accord Reetz v. Bozanich*, 397 U.S. 82, 86, 90 S.Ct. 788, 790, 25 L.Ed.2d 68 (1970); *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed.2d 444 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 1324, 12 L.Ed.2d 377 (1964).

Burford v. Sun Oil Co. and a group of arguably similar cases have been assembled into a uneasy category of abstention to which *Burford* lends its name.[10] Although the contours of *Burford*-type abstention are ill-defined, the doctrine when applicable is invoked where the "exercise of federal review of the [state law] question in a case and in similar cases would be disruptive of state efforts to

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ously restrict the measure of relief available in the district court." Congress disagrees. *See, e.g.*, S.Rep. No. 630, 91st Cong., 1st Sess. 1, 12-13 (1969). Although the issue is not directly before us and is not necessary to our decision, we believe *Moses Lake Homes* is distinguishable. If, prior to a state assessment, a district court enjoins the assessment of property in excess of a certain judicially determined value the court is not assessing a tax. It is still incumbent upon the state's taxing agency to formally assess the rail property at some value within the terms of the district court's injunction. Even were *Moses Lake Homes* applicable we believe the court's equity powers are sufficient to grant substantial and effective relief when dealing with the discriminatory tax as an entirety. The court's equity powers are also sufficient to eliminate the incentives to engage in protracted litigation either party might otherwise have.

[10] The other two categories are *Pullman*-type abstention and

establish a coherent policy with respect to a matter of substantial public concern." *Nasser v. City of Homewood*, 671 F.2d 432, 439 (11th Cir.1982) (quoting *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244); *see also BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 954-55 (5th Cir. 1977). Because *Burford* abstention results in the dismissal rather than stay of federal proceedings as well as in the "refusal to exercise federal jurisdiction in an entire class of cases, it is perhaps the most potent device in" the abstention area. *Nasser v. City of Homewood*, 671 F.2d at 440; *BT Investment Managers*, 559 F.2d at 955.

B. The propriety of abstention under the 4R Act.

Whether *Burford* should be applied to cover challenges by rail carriers to discriminatory state property tax assessments under section 11503 is a case of first impression in this circuit. The posture of the state and federal interests is significantly different in this case than in previous abstention cases. Because we decide that Congress meant unconditionally to ensure a federal forum for section 11503 claims, we conclude that the statute bars abstention in cases alleging de facto discrimination as well as de jure.

Younger-type abstention. Under the *Pullman* category, abstention may be appropriate where the resolution of a federal constitutional question properly before the federal court "is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law." *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50 (1965); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Abstention in a *Pullman* situation "may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Id. Younger*-type abstention counsels against intervention by federal courts to restrain state criminal or quasi-criminal proceedings. *E.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1974); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

1. The continued vitality of equitable restraint in suits involving state taxes.

Both Congress and the federal courts have acknowledged that the ability to administer fiscal affairs via taxation free of interference from the federal judiciary is of primary importance to a state's economical well-being. Federal courts had long practiced abstention or its equivalent in deference to this state interest by the time Congress passed the Tax Injunction Act, 28 U.S.C. § 1341. *See, e.g., Matthews v. Rodgers*, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932); *First National Bank v. Board of Commissioners*, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784 (1924); *Singer Sewing Maching Co. v. Benedict*, 229 U.S. 481, 33 S.Ct. 942, 57 L.Ed. 1288 (1913); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 29 S.Ct. 426, 53 L.Ed. 796 (1909). The Tax Injunction Act was intended to codify this pre-existing federal equity practice and to ensure more uniform adherence to the underlying principles of comity by erecting a jurisdictional bar to supplement the existing equitable restraint. *See generally United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir.1979).[11]

The equitable doctrine has not been replaced by section 1341. Since enactment of the provision courts have applied an equitable policy of non-interference to suits involving state taxes when the suits are not specifically within section 1341. *See, e.g., Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S.Ct. 177,

[11] Under Tax Injunction Act jurisprudence the central focus of the federal inquiry has been the adequacy of the state remedy. *Id.* It is obvious from the statutory language that this is the only possibility of gaining federal jurisdiction in a case falling within section 1341. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 73-74, 97 S.Ct. 219, 222-223, 50 L.Ed.2d 227 (1976).

70 L.Ed.2d 271 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *United Gas Pipe Line*, 595 F.2d at 326. The justification given by courts for refusing to hear state tax cases outside the literal scope of section 1341 involves a determination that congressional intent counsels the expansion followed by a decision that equitable restraint is appropriate under the circumstances.[12] *See California v. Grace Brethren Church*, 457 U.S. 393, 412-13, 416-17, 102 S.Ct. 2498, 2510-11, 2512-13, 73 L.Ed.2d 93 (1982); *Fair Assessment*, 454 U.S. at 107 & n. 4, 109-10, 102 S.Ct. at 181 & n. 4, 182-83; *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522-27, 101 S.Ct. 1221, 1234-36, 67 L.Ed.2d 464 (1981); *Great Lakes*, 319 U.S. at 300-01, 63 S.Ct. at 1074; *United Gas Pipe Line*, 595 F.2d at 326.

2. The congressional guarantee of a federal forum for section 11503 suits.

Without doubt the well-being of the nation's railroads is essential to its economic health. In passing section 11503 Congress acted "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract

[12] We refuse to accept either the state board's argument that the judiciary should exercise its equitable discretion regardless of contrary congressional intent and the railroad's argument that the courts are prevented from exercising equitable discretion because of a contrary expression of congressional intent. Because equitable considerations require the courts to consider competing federal and state policies we find that the court is not bound to follow congressional intention and hear any case for which Congress has provided jurisdiction especially when the subject matter of a particular case coming under such a jurisdictional grant is at the periphery of congressional attention. However, we also realize that the function of the legislative branch is to create law and policy and legislative grants of jurisdiction and their legislative histories are strong evidence of federal policy which we are charged by equity as well as constitutional considerations to consider.

carrier transportation property." S.Rep. No. 630, 91st Cong., 1st Sess. 1 (1969).

In hearings on the provision Congress heard testimony from the National Association of Tax Administrators on behalf of the states to the effect that state court remedies were "adequate to deal effectively with assessment discrimination cases" and that state tax departments made "substantial progress in eliminating discrimination" and that federal injunctive relief would interfere with states' abilities to classify property to carry out state policies promoting better land use, location of industry, homestead tax relief and old age property tax relief. *See* S.Rep. No. 630 at 8. Nevertheless Congress determined that strong federal policies demanded a federal forum as well as a federal substantive remedy. *Id.* at 6-7. Congress realized that the Tax Injunction Act, which prohibits district courts from enjoining state taxing activity where state law provides a plain, speedy, and efficient remedy in the state's courts, had the undesirable effect of closing the doors of the federal courts to railroads affected by discriminatory taxation where the state's remedies were neither plain, speedy, nor efficient. S.Rep. No. 630 at 6-8; S.Rep. No. 1483, 90th Cong., 2d Sess. 6 (1968). Therefore Congress provided in section 11503 a specific exemption to the Tax Injunction Act.

The state board argues that, in states such as Georgia where de jure discrimination does not exist, state and national policies are aligned and the federal judiciary should require taxpayers to use the state's remedies. We do not agree. The legislative history and broad language of the Act show Congress possessed a general concern with discrimination in all of its guises. *See* S.Rep. No. 630 at 6 (favorably quoting S.Rep. No. 445, 8th Cong., 1st

Sess. 466 (1961)); S.Rep. No. 630 at 15; S.Rep. No. 445 at 458.

Section 11503 suits differ from ordinary taxpayer suits in that the potential class of section 11503 plaintiffs is limited to rail carriers. Exercise of federal jurisdiction thus will not transform the district court into " 'a source of appellate review of all state property tax classifications.' " *Fair Assessment*, 454 U.S. at 114, 102 S.Ct. at 185 (quoting *Fair Assessment in Real Estate Association v. McNary*, 478 F.Supp. 1231, 1234 (E.D.Mo.1979)). There are, however, other concerns. A judicial appraisal of valuation techniques could well affect the state's choice of future assessment methods. Further, although the railroads are relatively few in number and tend to pool their litigation efforts their combined tax bill is substantial. "During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget . . . ."[13] *California v. Grace Brethren Church*, 457 U.S. at 410, 102 S.Ct. at 2509 (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n. 17, 91 S.Ct. 674, 699 n. 17, 27 L.Ed.2d 701 (1971)). Litigation of section 11503 claims could also allow the railroads to "escape the ordinary procedural requirements imposed by state law." *Id.*

The extensive legislative history of the 4R Act and its numerous predecessor bills makes it clear that Congress thoroughly considered the effects the Act would have on state taxation policies and practices. After weighing these

[13] In this case the district court enjoined the state board's issuance of an order assessing taxes. Thus Georgia has been unable to assess and collect even the undisputed portion of the taxes. Under Georgia law interest on past due taxes does not begin to accrue until after such an order is issued. If the district court does not grant appropriate equitable relief the railroads stand to gain a substantial and undeserved profit from their resort to federal court.

effects, Congress concluded that both a federal remedy and a federal forum were necessary to further the strong national policy of protecting interstate commerce from the disruptive effects of discriminatory state and local taxation of railroad property. *See, e.g.*, S.Rep. No. 630 at 6-8; S.Rep. No. 1483 at 6. Congress provided for both solutions in the resulting law.

"[A] court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy v. Board of Regents*, 457 U.S. 496, 501-02, 102 S.Ct. 2557, 2560-61, 73 L.Ed.2d 172 (1982). The legislative history of section 11503 demonstrates that Congress intended to carve out an exception not only to the Tax Injunction Act, but also to the underlying doctrine of equitable restraint in the narrow area of discriminatory taxation of railroads. Congress meant to guarantee a federal forum for railroad suits, and only an exemption from abstention in all its forms would accomplish this purpose. Since Congress has spoken, it is not our province to alter the balance Congress struck in providing a federal forum for rail carrier claims of tax discrimination under section 11503.

Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), does not require a different result. In a suit for damages under section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, taxpayers claimed that disparate assessment of their newly improved real property deprived them of equal protection and due process of law. Section 1983 ordinarily provides an immediate federal forum for citizens whose constitutional or federal rights allegedly have been denied by any state despite the presence of an an adequate state forum. *See McNeese v. Board of Educa-*

tion, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Viewing the case as a clash between "two divergent lines of [statutory] authority," 454 U.S. at 105, 102 S.Ct. at 180, the Supreme Court ruled that the principle of comity together with section 1341 require abstention in the face of jurisdiction under section 1983.

Section 11503 involves no such collision with the Tax Injunction Act. Its legislative history, unlike that of section 1983, evinces a congressional intent to exempt taxpayer plaintiffs from the Tax Injunction Act as well as from the comity principle. Further, because the economic due process claims in *Fair Assessment* fell at the extreme periphery of the concern behind section 1983, abstention in that context left the vital core of section 1983 protections intact. Abstention here, in contrast, would rob the jurisdictional grant of section 11503 of all meaning, since the railroad plaintiffs belong to the small class of direct beneficiaries contemplated by Congress and seek precisely the tax relief the section affords. Finally, the potential for wholesale federal litigation of state taxpayer claims, very real under section 1983, is nonexistent under section 11503.

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), exemplifies an instance in which a jurisdictional statute properly took precedence over the equitable restraint doctrine and its statutory counterpart, section 1341. The Supreme Court gave effect to a district court decision enjoining Montana's collection of certain vendor licensing and sales taxes from Indian merchants. In deciding that abstention in the case was improper the Court relied on a jurisdictional statute, enacted ten years earlier, which reflected a congressional

intent to provide Indian nations with a federal forum for certain civil actions. *See* 28 U.S.C. § 1362. Neither the statute nor its legislative history mentions any exemption from the Tax Injunction Act. The Court concluded however that the statute conferred jurisdiction despite the command of the Tax Injunction Act because the statute, as construed, extended to the tribes the common law exception to section 1341 which allows the United States and its instrumentalities to sue in federal court to complain of "unconstitutional state exactions." 425 U.S. at 470-74, 96 S.Ct. at 1639-42 (quoting *Department of Employment v. United States*, 385 U.S. 355, 358, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966)).

The railroads in this case as the Indian groups in *Moe* are beneficiaries of recently enacted nonexclusive grants of jurisdiction. Both groups reside near the center of the concern underlying the federal policy reflected in the laws enacted. The particular case which the railroad carriers press here bears more directly on the narrow situation contemplated by Congress than does the cause in *Moe* on the much broader grant of section 1362. *See Moe*, 425 U.S. at 473, 96 S.Ct. at 1641. The express words of exemption contained in the legislative history of section 11503 are a further recommendation not present in *Moe* against abstention.[14] We conclude that the recent, speci-

[14] It is the state board's contention that the role of an independent judiciary is to apply its own notions of comity and federalism in disregard of those expressed by Congress in legislation. As our opinion in this case indicates federal courts have never applied the abstention doctrines in a vacuum. These doctrines are shaped by competing state and federal interests and both interests must be considered. The supremacy clause requires the courts to grant great deference to Congress' direct, unequivocal and constitutional exercise of its legislative power. This case presents no compelling reason for the court to ignore Congress' intention and refuse to exercise its duly conferred jurisdiction.

fic expression of congressional intent and national policy reflected in section 11503 requires federal district courts to hear section 11503 cases brought before them. We find that the district court in abstaining abused its discretion, reverse and remand to district court for consideration on the merits.[14]

VI. The Cross-Appeal.

The state board argues on cross-appeal that the injunction entered by the district court has prevented it from obtaining the undisputed portion of the railroads' tax bill. The state board also argues that the railroads will be unjustly enriched should the state not receive interest on the undisputed amount. We agree and order the district court to modify its injunction to allow the state to immediately assess and collect the undisputed amount of taxes without waiving its entitlement to the disputed amount. Furthermore the district court should require the railroads to pay interest on the undisputed amount of taxes and on any additional amount the court finds not in violation of section 11503 and the state chooses to assess and collect. The interest is to be assessed from the date such taxes would have become due *but for the district court's injunction* and at the rate set by Georgia law for

[14] When the district court decided this case there was only one other court which had directly addressed the abstention issue. The other court abstained. *Missouri Pac. R.R. v. Tax Div.*, 504 F.Supp. 907 (E.D.Ark.1980). Since that time there have been several more. To our knowledge none other than the district court in this case has chosen to abstain. *See Burlington N.R.R. v. Bair*, Civ. No. 83-100-A (S.D.Iowa filed June 17, 1983); *Atchison, T. & S.F. Ry. v. Arizona*, 559 F.Supp. 1237, 1248-49 (D.Ariz.1983); *Trailer Train Co. v. State Bd. of Tax Comm'rs*, No. IP 82-45-C (S.D.Ind. Nov. 3, 1982); *Southern Pac. Transp. Co. v. California*, No. C 81-4848 SW (N.D.Cal. Sept. 1, 1982); *Atchison, T. & S.F. Ry. v. Lennen*, 552 F.Supp. 1031, 1037-38 (D.Kan.1982) (disapproving the result reached by the district court in this case).

taxes due but not paid from that date until payment is actually made.

REVERSED and REMANDED WITH INSTRUCTIONS.

PART II

DISTRICT COURT DECISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHERN RAILWAY COMPANY;
THE ALBAMA GREAT SOUTHERN RAILWAY COMPANY;
CENTRAL OF GEORGIA RAILROAD COMPANY;
THE GEORGIA NORTHERN RAILWAY COMPANY;
GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY;
LIVE OAK, PERRY AND SOUTH GEORGIA RAILWAY COMPANY;
TENNESSEE, ALABAMA AND GEORGIA RAILWAY COMPANY;
SEABOARD COAST LINE RAILROAD COMPANY; and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Plaintiffs,

vs.

STATE BOARD OF EQUALIZATION of the State of Georgia;
W. E. STRICKLAND, ARTHUR K. BOLTON, WILLIAM M. NIXON, JR., MARCUS E. COLLINS, and JIMMY LESTER, Members of the State Board of Equalization of Georgia, and their successors in office;
W. E. STRICKLAND as Commissioner of Revenue of the State of Georgia, and his successors in office,
Defendants.

CIVIL ACTION No. C 81-695 A

ORDER

This is an action seeking to restrain and enjoin the defendants from assessing the plaintiffs' property for purposes of ad valorem taxation for the 1979 tax year pursuant to a decision of the State Board of Equalization of the State of Georgia rendered on April 15, 1981, to the extent that such assessments are allegedly contrary to 49 U.S.C. § 11503, from certifying and distributing such assessments to counties and other local taxing authorities in Georgia, and from taking any other steps to collect allegedly excessive ad valorem taxes from the plaintiffs that are based upon the State Board of Equalization's decision. The plaintiffs also seek a declaratory judgment that the defendants' proposed assessments of the plaintiffs' property for the 1979 tax year and the certification and distribution of such assessments violate 49 U.S.C. § 11503. The court initially granted the railroads' motion for a temporary restraining order, and on May 11, 1981, the court entered a preliminary injunction, the terms of which had been agreed upon by the parties. Several motions are before the court, but the court's decision to abstain makes it unnecessary to consider the other pending motions.

In 1976 Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, reprinted in [1976] U.S. Code Cong. & Ad. News 14 (sometimes referred to as the "4R Act") for the purpose of promoting the revitalization of the railway system of the United States. Recognizing that one of the major problems faced by the railroads was the heavy and often discriminatorily high taxation of railroad property by various states, Congress prohibited as "an unreasonable and unjust discrimination against, and an undue burden on, interstate com-

merce," a state's assessment

> for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property, and the ratio which the assessed value of all other commercial and industrial property and the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

Section 306 of the 4R Act, from which the above quotation comes, was enacted into law on February 5, 1976; however, the effective date of section 306 was set for three years after that date. Section 306 was originally codified at 49 U.S.C. § 26c, but before the effective date Congress recodified that section as part of its revision of the Interstate Commerce Act, and that section is now codified at 49 U.S.C. § 11503. (The language of 49 U.S.C. § 11503 as codified differs from the language of section 306 as enacted; however, the court finds these changes insubstantial for purposes of the question of whether the court should abstain.)

Prior to the enactment of the 4R Act, railroad company efforts to remedy what even Congress perceived as rather pervasive tax discrimination by resort to the federal courts had generally been unsuccessful because of the jurisdictional limitations on federal judicial authority contained in 28 U.S.C. § 1341, which prohibits federal district courts from enjoining the "assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Traditionally, as a matter of comity, federal courts have been reluctant to find state remedies inadequate. *See* Tully v. Griffin, Inc., 429 U.S. 68, 97 S.Ct. 219 (1976). This reluctance had worked a particular

hardship upon railroads, since under many state laws a challenge to a tax assessment had to be brought against numerous local tax collecting authorities rather than against a central tax assessing department. Recognizing this deficiency, Congress provided under section 306 that notwithstanding 28 U.S.C. § 1341 the district courts of the United States would have jurisdiction "to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments" as might be necessary to prevent, restrain, or terminate unlawful assessments, provided, however, that such jurisdiction would not be exclusive of state jurisdiction and provided further that no relief could be granted under section 306 "unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction."

I. Factual Background of the Case *Sub Judice* and Georgia Assessment Procedure

All non-exempt real and personal property held within the state of Georgia on January 1 of each year is subject to ad valorem taxation.[1] Non-utility property subject to ad valorem taxation in Georgia is appraised and assessed for ad valorem tax purposes (following a valuation return made by the taxpayer) by the county tax commissioner or receiver of the county wherein the property is located. Ga. Code Ann. § 91A-1018. Utility property subject to

[1] The revenue title of the Georgia Code was revised and became effective on January 1, 1980, as Title 91A of the Georgia Code; prior to this revision and recodification, the revenue title was found at Title 92 of the Georgia Code. Since there were no substantive changes in the pertinent statutes relevant to this litigation, citation will be to the revised and recodified title.

ad valorem taxation, on the other hand, is appraised and assessed for ad valorem tax purposes (following a valuation return by the utility) by the Commissioner of the State Department of Revenue. Ga. Code Ann. § 91A-2211. The property of railroad companies is defined as public utility property for purpose of ad valorem taxation and is thus assessed and taxed by the Commissioner of the State Department of Revenue. Ga. Code Ann. § 91A-102(c).

The railroads are required to make annual returns for the value of their property by March 1 and to set forth those values as of the preceding January 1. Ga. Code Ann. § 91A-2201. The Commissioner then assesses the amount of the railroad's property in each county. Ga. Code Ann. § 91A-2211. Each year the Commissioner must then submit his completed digest to the State Board of Equalization so that it can determine whether the assessments are "reasonably apportioned between the several tax jurisdictions and are reasonably uniform with the value set on other classes of property throughout the state." Ga. Code Ann. § 91A-217(b). After final approval by the State Board of Equalization of the Digest of Proposed Assessments, the Commissioner within ten days notifies the railroad of the proposed assessment and informs the railroad that it has ninety days in which to appeal. Ga. Code Ann. § 91A-217(c). If dissatisfied with the assessment, the railroad may appeal to the State Board of Equalization, and this appeal follows "as far as is practical, the procedure for an appeal by a taxpayer to his county board of equalization." Ga. Code Ann. § 91A-2204; *see* Ga. Code Ann. § 91A-1449. Following a hearing before the State Board of Equalization and a decision by that board, the railroad has thirty days in which to appeal that decision to the superior court; "[t]he

procedure provided by law for applying for and granting appeal from the probate court to the superior court shall apply as far as suitable to the appeal." [2] Ga. Code Ann. §§ 91A-217(d), -255(b).

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[2] The confusing procedure of referencing appeal procedures to various other code sections sometimes makes it difficult to discern which procedure is to be used at the different stages of the proceedings. Apparently, an appeal of the assessment by the Revenue Commissioner to the State Board of Equalization is the same procedure as provided for an appeal from a county commissioner to a county board of equalization. However, a different procedure is then utilized for an appeal from the State Board of Equalization instead of the appeal procedure provided for in the case of an appeal from the county board of equalization. In an appeal from a county board of equalization to the superior court, the appeal is a de novo action. Ga. Code Ann. § 91A-1449(f)(3). In the case of an appeal from a ruling by the Commissioner (and this is the procedure to be followed in an appeal from a State Board of Equalization, *see* Ga. Code Ann. § 91A-217(d)), there is no such explicit provision that the appeal is a de novo action. This confusion is made only slightly less confusing by the fact that the Georgia Supreme Court has ruled that a statutory provision empowering Georgia courts to reajudicate questions of law and fact that have already been committed to the administrative discretion of county boards of zoning appeals is unconstitutional. Bentley v. Chastain, 242 Ga. 348 (1978). Since assessment by either the State Revenue Commissioner or a County Tax Commissioner and a subsequent determination by either a State or County Board of Equalization is clearly an administrative procedure, this court believes that there is little doubt that any review by a State Superior Court would not constitute a de novo proceeding. However, the mere fact that the review is not de novo in no way means that the railroads have been deprived of an adequate remedy in the state proceedings. *See, e.g.*, Alabama Public Service Commission v. Southern Ry., 341 U.S. 348, 349, 71 S.Ct. 762, 768 (1951), wherein the court stated:

> The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity . . . .
>
> As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. (Footnote omitted.)

Each of the plaintiff railroads returned its property as required by Georgia law, and the property of each was assessed by the State Revenue Commissioner. Each railroad then filed its notice of appeal to the State Board of Equalization, contending that the proposed assessments violated the 4R Act in that railroad property was assessed at a value which was at a higher ratio to its true market value than the ratio of the assessed value of commercial and industrial property to their true market value.

The railroads' appeals were initially heard by a hearing officer appointed by the State Board of Equalization. This hearing was de novo in nature and involved the taking of substantial evidence by all parties on all issues raised by the railroads; the hearing lasted approximatley six days and produced a transcript exceeding 1400 pages, and all parties filed extensive post-trial briefs arguing the issues presented to the hearing officer. On January 5, 1981, the hearing officer filed his report in which he made certain findings and recommendations. The hearing officer expressly found that the discrimination prohibited by 49 U.S.C. § 11503 had not occurred.

In April 1981 the State Board of Equalization met to consider the recommendations of the hearing officer. The Board apparently voted to uphold the hearing officer in various respects, including the conclusion that the railroads had not shown any violation of section 306. On April 15, 1981, prior to the time that the Board of Equalization could enter a final order and terminate its proceedings, the plaintiffs filed this proceeding and obtained a temporary restraining order which had the effect of prohibiting any final determination by the State Board of Equalization.

II. Analysis of the 4R Act and Georgia Law

To place this case in its proper perspective it is essential to focus on the narrow question presented. Once the non-issues are extracted, with all their interesting, but irrelevant, applications and ramifications, the remaining issue is clearly seen as one more properly considered by the state courts rather than the federal courts.

First, the railroads do not allege that the taxing statutes of the State of Georgia are on their face discriminatory against the railroads and thus in violation of section 306. This the railroads could not argue, for the Georgia Constitution requires that "All taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Classes of subjects for taxation of property shall consist of tangible property in one or more classes of intangible personal property including money." Ga. Code Ann. § 2-4603. Ga. Code Ann. § 91A-1019 provides that all taxable tangible property shall be assessed at 40% of its fair market value. Georgia both statutorily and constitutionally mandates that railroad property be assessed at the same percentage that other commercial and industrial property is assessed and thus conforms to the requirements of section 306. Any violation of section 306 would also be a violation of the Georgia Constitution and the Georgia Code.

The Georgia requirement that railroad property be assessed at the same percentage of fair market value as other commercial and industrial property makes the case *sub judice* different from the Alabama, Arizona, and Tennessee cases cited by the railroads. In Arizona v. Atchison, Topeka and Santa Fe R.R., ___ F.2d ___, slip op. 2848 (9th Cir. June 12, 1981), the court noted that Arizona divided property into seven classes for the purpose

of property tax assessment. Railroad property, which fell under Class 1, was assessed at 60% of its full cash value. "Most, if not all, other commercial and industrial property was contained in Class 2, which was assessed at 50% of full cash value, and Class 3 which was assessed at 27% of full cash value." ____ F.2d at ____ (fn. omitted). In Tennessee v. Louisville & Nashville R.R., ____ F.2d ____, No. 79-1515 (6th Cir. March 20, 1981), the court found that Tennessee assessed railroad property at 55% of value whereas other commercial and industrial property was classified and assessed at 40% of value for real property and 30% for personal property. In Alabama Great Southern R.R. v. Eagerton, 472 F. Supp. 60 (N.D. Ala. 1979), *aff'd*, 629 F.2d 1347 (5th Cir. 1980), the court found that Alabama assessed railroad property at 30% of fair market value whereas other commercial and industrial property was assessed at 20% of fair market value. In each of these cases the federal courts were called upon to consider whether state revenue statutes conflicted with section 306 of the 4R Act and the congressional purpose and intent behind that Act. No such issue is present in the instant case, since there is no conflict between the Georgia Revenue Code and section 306, each requiring that railroad property be assessed at the same ratio to true market value as other commercial and industrial property.

Second, any contention by the railroads that the State Board of Equalization misapplied either federal or state law as such law relates to the tax structure imposed on the railroads would be without merit, since state law requires, and the State Board of Equalization so recognized, that uniformity of taxation is required.

Third, the railroads are not even alleging that the State

Board of Equalization failed to consider the requirement that railroad property must be treated equally with commercial and other industrial property. The hearing officer explicitly found that such equality and uniformity was required.

The issue before the court thus resolves itself into the simple question of whether the valuations placed upon the railroads' property and the subsequent assessment at 40% of such value were correct. It is true that if railroad property were valued at a price greater than its fair market value and then assessed at 40% of such valuation and if all other commercial and industrial property were valued at its fair market value and then assessed at 40% of that value, such assessments of the railroads' property would be in violation of section 306. However, such valuation would also be in violation of both the Georgia Constitution and the Georgia taxing statutes. Fairly read, the railroads' complaint does not allege any sinister plot on the part of the State Department of Revenue to circumvent either section 306 or the Georgia statutes by purposefully valuing their properties at a value higher than the actual true market value; the complaint merely alleges that the valuations and resulting assessments are incorrect. Thus narrowed, the focus of the railroads' complaint is whether the valuation placed upon their property is, indeed, the fair market value.

III. Abstention

Abstention is a court-formulated doctrine under which a federal court may decline to exercise or may postpone the exercise of its jurisdiction over a pending proceeding and instead defer to a state court of a state administrative proceeding. The three types of abstention established

by the Supreme Court are as follows:

(1) *Pullman* abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of the relevant state law. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941).

(2) *Younger* abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal court jurisdiction has been invoked for the purpose of restraining certain types of state proceedings.[3] Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971).

(3) *Burford* abstention is appropriate in cases in which a federal decision could cause needless conflict with the administration by a state of its own affairs. Burford v. Sun Oil Company, 319 U.S. 315, 63 S.Ct. 1098 (1943).

The court finds that there is no basis for abstention under either the *Pullman* or *Younger* doctrines and finds that if abstention is appropriate at all in the instant case it would be appropriate only under the *Burford* rationale.

In *Burford* the Sun Oil Company challenged the validity of an order of the Texas Railroad Commission grant-

[3] *Younger* grew out of an attempt to have a federal district court enjoin an ongoing state criminal proceeding, and the *Younger* abstention doctrine has generally been applied only where state criminal proceedings were sought to be enjoined. The *Younger* abstention doctrine was made applicable to situations wherein injunctions were sought against state civil proceedings in Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). However, the court in *Huffman* noted the three narrow exceptions wherein federal court intervention was justified: If the state proceeding is motivated by a desire to harass or was conducted in bad faith or if the challenged statute is flagrantly and patently unconstitutional. The defendants do not contend that the instant case falls within any of these narrow exceptions, and the court specifically finds that the *Younger* abstention doctrine is inapplicable to the instant case.

ing Burford a permit to drill several oil wells on a small oil field in Texas. Jurisdiction existed both by virtue of diversity of citizenship and because Sun Oil Company alleged that the Commission's order denied it due process of law. The Supreme Court acknowledged that the district court had jurisdiction over the subject matter of the action but went on to state that jurisdiction notwithstanding, a federal court could, in its sound discretion, refuse to enforce or protect legal rights, the exercise of which might be prejudicial to the public interest since it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." 319 U.S. at 318, 63 S.Ct. at 1099, quoting United State v. Dern, 289 U.S. 352, 360, 53 S.Ct. 614, 617 (1933). The Supreme Court reversed the Court of Appeals and affirmed the district court's order dismissing the complaint. In ruling that abstention was proper, the Supreme Court considered two factors which it felt warranted abstention: (1) federal intervention could result in a disruption of state public policy and (2) the Texas courts possessed a special expertise over the issue presented to the federal court.

With respect to the first factor, the federal courts, as well as Congress, have long recognized taxation that is one of the most basic and vital functions carried out by a state, for without the ability to tax, a state would be unable to provide any of the services for which it exists. Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070 (1943); *see also* the Anti-Injunction Statute, 28 U.S.C. § 1341. This court recognizes that section 306 provides a specific exemption to the Anti-Injunction Statute, but the court also notes that section 306 does not provide exclusive federal jurisdiction and

further notes that the basic evil which section 306 sought to remedy (unequal treatment of railroads under state statutes) is not found in Georgia, since Georgia law already provides that railroad property is to be treated the same as all other commercial and industrial property.

In the instant case, since state public policy mirrors federal public policy with regard to uniform taxation of railroad property, this court does not believe that it should unnecessarily intrude into the administration of a state's taxing policy and procedure. Such intrusion is especially inappropriate in the instant case, since administration and application of state policy will result in effectuation of federal public policy. Such a result would not have occurred in the cases involving the Alabama, Arizona, and Tennessee taxation statutes, and federal court intervention was appropriate in the cases arising in those states.

With respect to the second factor presented in *Burford*, this court notes that the Georgia Department of Revenue has special expertise over the matter of valuation and assessment. With no desire to belabor the point, the court points out again that neither the applicability nor validity of Georgia's taxation statutes is at issue. The only issue is whether railroad property has been properly valued and assessed. The Georgia Code provides an administrative procedure whereby railroads can challenge the valuation placed upon their property, and if the railroads are dissatisfied with this valuation, they can appeal through an administrative process and if still dissatisfied can appeal to the Georgia courts. This is substantially the same procedure provided to the litigants in *Burford*. In the case *sub judice*, the railroads began to pursue their administrative remedies after the initial val-

uation even though under section 306 the railroads could have come into federal court at that time before pursuing their administrative appeal. Although not determinative of the issue, this invocation of the state administrative appeal process is another factor which this court feels is worthy of consideration in deciding to abstain and thus not unnecessarily intrude in an ongoing administrative procedure on the state level.

Another reason for this court to abstain is the fact that protracted litigation could result because of the fact that the remedy which this court can provide is severely limited. This court cannot establish valuations and assessments for railroad property but can only determine if the state valuations conflict with section 306. If the court determines that the state valuations are incorrect, it can only send the proceedings back for another determination by the State Department of Revenue; if the railroads are dissatisfied with the new valuation, another appeal would follow, and this court could either only affirm or "remand." It is not the court's job to determine the value of the railroad property, but the court simply looks at the assessment of the railroad property and the assessment of other non-railroad property to determine if the assessments differ by more than 5%; only if the assessments vary by more than 5% could this court exercise jurisdiction under section 306. If this court determined that the railroad property had been valued at 104% of its actual value whereas all other commercial and industrial property had been correctly valued at 100%, this court would have no jurisdiction to provide any relief, whereas a state court would have the authority to require that the railroad property be valued and assessed in compliance with state law. Furthermore, even if this court found the variation to be greater than 5%,

it still would have no authority to make the correct assessments. The Supreme Court in clear, unambiguous language has stated, "Federal courts may not assess or levy taxes. Only the appropriate taxing officials of [the state or county] may assess and levy taxes . . . and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 81 S.Ct. 870 (1971). Under Georgia law assessment at 40% of fair market value is a purely administrative task once the valuation has been made, and this court would not be able to circumvent the clear mandate of *Moses Lake* by couching its judgment in terms of "valuing" railroad property instead of "assessing" railroad property.

For the foregoing reasons this court concludes that in the exercise of its discretion it should abstain in this case. Since a determination by the state courts will be conclusive, no purpose would be served by staying this action pending resort to the state appellate process, and this court, like the court in *Burford*, concludes that the complaint should be dismissed.

IV. Injunction Pending Appeal

Because the court believes that the status quo with respect to these parties should be maintained pending an appeal by the plaintiffs to the Court of Appeals for the Fifth Circuit, the preliminary injunction previously entered in this case will remain in effect pending appeal. *See* Atchison, Topeka & Santa Fe Ry. v. Lennen, 640 F.2d 255 (10th Cir. 1981).

IV. Summary

The court hereby abstains in the instant case, and the complaint is dismissed. However, the preliminary injunction previously entered shall remain in effect pending appeal.

SO ORDERED, this 27th day of August, 1981.

/s/ ROBERT L. VINING, JR.

ROBERT L. VINING, JR.
United States District Judge

PART III

DISTRICT COURT DENIAL OF MOTIONS TO RECONSIDER

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SOUTHERN RAILWAY COMPANY, *et al.*, *Plaintiffs*, UNITED STATES OF AMERICA, *Plaintiff-Intervenor.* vs. STATE BOARD OF EQUALIZATION of the State of Georgia, *et al.*, *Defendants.*	CIVIL ACTION No. C 81-695 A

ORDER

The plaintiffs' motion to reconsider and vacate the court's order of August 27, 1981, in which this court exercised its discretion and abstained has been read and considered, and the same is hereby DENIED.

The intervenor's motion to alter or amend the order of August 27 has been read and considered, and the same is hereby DENIED.

The defendants' motion to modify order and judgment of August 27 has been read and considered, and the same is hereby DENIED.

SO ORDERED, this 9th day of October, 1981.

/s/ ROBERT L. VINING, JR.

ROBERT L. VINING, JR.
United States District Judge

PART IV

COMPLETE TEXT OF SECTION 306

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results

in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial

property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term—

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or indus-

trial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.".

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Supreme Court, U.S.
FILED
DEC 28 1983
ALEXANDER L. STEVAS
CLERK

No. 83-886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE BOARD OF EQUALIZATION OF THE STATE OF GEORGIA, *et al.*,
Petitioners,

v.

SOUTHERN RAILWAY COMPANY, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Dissatisifed with the Petitioners' presentation of the question presented, Respondents state the question as follows:

> Did the Court of Appeals correctly conclude that *Burford*-type abstention is improper in railroad tax discrimination cases under 49 U.S.C. § 11503 where:
>
> a. Congress has expressly determined that the national interest requires the elimination of discriminatory state taxation of rail transportation property; and
>
> b. Congress has expressly conferred jurisdiction upon federal district courts to prevent such discrimination?

LIST OF PARTIES TO THIS PROCEEDING

The Petitioners are the State Board of Equalization of the State of Georgia and its members, Marcus E. Collins, Sr., Michael J. Bowers, Jimmy Lester, William M. Nixon, Jr. and Joe Mack Wilson. Petitioners will be referred to hereinafter as the "State Board."

Respondents are the United States of America and certain railroads operating within the State of Georgia. The railroad petitioners (hereinafter referred to as the "railroads") are: Southern Railway Company, The Alabama Great Southern Railway Company, Central of Georgia Railroad Company, The Georgia Northern Railway Company, Georgia Southern and Florida Railway Company, Live Oak, Perry and South Georgia Railway Company, Tennessee, Alabama and Georgia Railway Company, Seaboard Coast Line Railroad Company, and Louisville and Nashville Railroad Company. The parents, subsidiaries and affiliates of these railroads are numerous and are listed in Appendix A to this brief.

This brief is filed on behalf of all Respondents except the United States of America.

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IN THE

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OCTOBER TERM, 1983

No. 83-886

STATE BOARD OF EQUALIZATION
OF THE STATE OF GEORGIA, *et al.*,
Petitioners,

v.

SOUTHERN RAILWAY COMPANY, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

Citations to the opinions and judgments delivered in the courts below are set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the statute involved in this case, Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976), now codified at 49 U.S.C. § 11503, are set forth in

the Petition. In accordance with the practice of the Eleventh Circuit, the railroads will refer to this statute as "Section 11503."

COUNTERSTATEMENT OF THE CASE

Dissatisfied with the State Board's Statement of the Case, the railroads adopt as their counterstatement the Court of Appeals' description of the case as set forth in *Southern Ry. Co.* v. *State Bd. of Equalization*, Appendix to the Petition, pp. 3a through 7a, with the following supplement:

Following the issuance of the Eleventh Circuit's decision in this case, the State Board moved for a stay of the mandate of the Court of Appeals pending the filing of the petition for certiorari. That motion was denied on October 24, 1983.

In addition, the railroads contend that the State Board's Statement of the Case contains a number of errors. The most important of those errors is an attempt to describe state administrative proceedings which occurred prior to the filing of the railroads' complaint in federal court. The State Board makes the following assertion:

> Each railroad agreed that the State Board had jurisdiction to grant relief based upon [Section 11503], and actively litigated its [Section 11503] cause of action before the State Board.

Petition, p. 3. This statement is erroneous. The railroads have never conceded, nor do they now concede, that state administrative agencies have jurisdiction to grant relief under Section 11503. Rather, the railroads only acknowledged that the State Board had jurisdiction *under Georgia law* to grant the railroads equalization relief which might obviate the necessity for filing a federal action

under Section 11503. The railroads raised Section 11503 before the State Board in order to exhaust available state administrative remedies, to give to the State Board an opportunity to grant equalization relief meeting the requirements of Section 11503, and to avoid any later suggestion that the railroads had "waived" their Section 11503 rights by failing to raise them at the state administrative level.

REASONS FOR DENYING THE WRIT

1. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of A Court Of Appeals Or Of This Court.

The State Board asserts that the Court of Appeals' decision "conflict[s] with a half century of Supreme Court jurisprudence." Petition, pp. 7, 12. This assertion is incorrect. This Court has never ruled that federal courts should decline jurisdiction where national interests are paramount and where the rights being asserted by the plaintiffs are precisely the federal rights which Congress sought to protect by enacting special remedial legislation.

Before the District Court and the Court of Appeals, the State Board argued that the railroads' Section 11503 complaint should be dismissed under the principles of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). In *Burford*, Sun Oil Company brought an action in federal court to enjoin enforcement of an order of the Texas Railroad Commission which granted Burford a permit to drill four wells in the East Texas oil field. Jurisdiction was predicated upon diversity and upon an alleged violation of the Fourteenth Amendment. This Court held that Sun Oil's complaint should have been dismissed because the exercise of federal jurisdiction in that case would have been disruptive of state efforts to establish a coherent local policy with respect to the exploitation of Texas oil and gas fields. The first step in this Court's analysis in *Burford* was to look at

congressional policy regarding oil conservation matters. This Court noted that the federal government had chosen to leave the principal responsibility for oil conservation regulation with the states. *Id.* at 319.

The State Board contends that *Burford* establishes the principle that courts are not constrained by congressional policy in determining whether to exercise jurisdiction in a particular case. Petition, p. 8. The State Board's contention ignores the essential point, mentioned above, that this Court in deciding *Burford* specifically noted that Congress had chosen to leave the regulatory responsibility for oil conservation to the states. Thus, the State Board's assertion that this Court in *Burford* disregarded congressional policy in determining whether jurisdiction should be exercised is in error.

The reasons which justified abstention in *Burford* are not present in this case. This case involves a national problem, i.e. disruption to interstate commerce resulting from discriminatory taxation of railroads, not a local problem as in *Burford*. In enacting Section 11503, Congress specifically determined that the principal responsibility for eliminating discriminatory taxation of railroads should *not* be left with the states.

The State Board also contended below, as it contends here, that the exercise of federal jurisdiction in Section 11503 cases will disrupt the administration of state ad valorem taxes and that *Burford*-type abstention, or dismissal, is therefore appropriate. However, the Court of Appeals concluded that, insofar as a state seeks to impose discriminatory ad valorem taxes upon interstate railroads, Congress *intended* to disrupt the administration of state ad valorem taxes. As noted by the Court of Appeals, Congress enacted Section 11503 in order to facilitate interstate commerce and to protect railroads from the

debilitating effects of discriminatory state and local taxation. Congress thoroughly considered the effects which Section 11503 would have upon state tax policies and administration and determined that a federal judicial remedy was essential to protect the right to nondiscriminatory tax treatment. Because Congress had determined that federal interests were paramount in Section 11503 cases, the Court of Appeals concluded that *Burford*-type abstention was improper.

The only cases cited in the Petition for the existence of a "conflict" which are not addressed in the Eleventh Circuit's opinion are *Alabama Public Service Commission* v. *Southern Ry.*, 341 U.S. 341 (1951), and *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25 (1959). Neither case involves the exercise of federal jurisdiction under a statute, such as Section 11503, which expressly confers jurisdiction upon federal district courts to remedy a specific problem of national concern. Furthermore, the Petition misconstrues *Alabama Public Service Commission* in two respects. First, the Petition incorrectly asserts that the "28 U.S.C. § 1342 argument rejected in [*Alabama Public Service Commission*] is virtually identical to the 28 U.S.C. § 1341 argument accepted by the Court of Appeals below, making clear the conflict in principle between the two decisions." Petition, p. 12. The exemption from 28 U.S.C. § 1342 which the railroad in *Alabama Public Service Commission* sought to supply by negative inference is *not* equivalent to the specific exemption from 28 U.S.C. § 1341 found in Section 11503. Second, the Petition fails to note that this Court in *Alabama Public Service Commission* first looked at congressional policy in considering the abstention question. There this Court stated:

> [I]t has long been held that this interblending of the interstate and intrastate operations does not deprive

> the states of their primary authority over intrastate transportation *in the absence of congressional action supplementing that authority.*

341 U.S. at 345 (emphasis added). Properly interpreted, *Alabama Public Service Commission* directly supports the railroads' position that congressional intent controls the exercise of federal jurisdiction, and refutes the State Board's assertion of a conflict with the decision of the Court of Appeals in this case.

The State Board also contends that the decision of the Court of Appeals is "in clear conflict" with *Fair Assessment in Real Estate Association* v. *McNary*, 454 U.S. 100 (1981). Petition, p. 9. This is not so. In its opinion the Court of Appeals discussed *Fair Assessment* at length and concluded that the decision in *Fair Assessment* has no application to this case. In *Fair Assessment*, this Court ruled that the principle of comity, together with 28 U.S.C. § 1341, require abstention even though jurisdiction exists under 42 U.S.C. § 1983. The Court of Appeals found, however, that the "clash" between two divergent lines of statutory authority in *Fair Assessment* was not present in this case. The court noted that the legislative history of Section 11503, unlike that of 42 U.S.C. § 1983, evidences a congressional intent to exempt taxpayers from the Tax Injunction Act as well as from the comity principle. The court noted further that, because the economic due process claims in *Fair Assessment* fell at the extreme periphery of the concern behind 42 U.S.C. § 1983, abstention in that context left the vital core of 42 U.S.C. § 1983 protections intact. The Court of Appeals then stated:

> Abstention here, in contrast, would rob the jurisdictional grant of section 11503 of all meaning, since the railroad plaintiffs belong to the small class of direct beneficiaries contemplated by Congress and seek

> precisely the tax relief the section affords. Finally, the potential for wholesale federal litigation of state taxpayer claims, very real under section 1983, is nonexistent under section 11503.

Appendix to the Petition, p. 15a.

In response to the State Board's suggestions of disruption and a "conflict," the railroads rely upon the reasoning of, and the authorities cited by, the Court of Appeals. The Court of Appeals stated:

> The extensive legislative history of the [Railroad Revitalization and Regulatory Reform] Act and its numerous predecessor bills makes it clear that Congress thoroughly considered the effects the Act would have on state taxation policies and practices. After weighing these effects, Congress concluded that both a federal remedy and a federal forum were necessary to further the strong national policy of protecting interstate commerce from the disruptive effects of discriminatory state and local taxation of railroad property. *See*, e.g., S. Rep. No. 630 at 6-8; S. Rep. No. 1483 at 6. Congress provided for both solutions in the resulting law.
>
> '[A] court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.' *Patsy* v. *Board of Regents*, 457 U.S. 496, 501-02, 102 S.Ct. 2557, 2560-61, 73 L. Ed.2d 172 (1982). The legislative history of section 11503 demonstrates that Congress intended to carve out an exception not only to the Tax Injunction Act, but also to the underlying doctrine of equitable restraint in the narrow area of discriminatory taxation of railroads. Congress meant to guarantee a federal forum for railroad suits, and only an exemption from abstention in all its forms would accomplish this purpose. Since Congress has spoken, it is not our province to alter the balance Congress struck in providing

a federal forum for rail carrier claims of tax discrimination under section 11503.

Appendix to the Petition, pp. 13a-14a.

The contentions of the State Board constitute nothing more than a reargument of the merits of the abstention issue and do not present any grounds for the issuance of a writ of certiorari.

2. No Special Or Important Reasons Exist For Granting The Writ.

The State Board contends that this case is important for two reasons: (1) the Court of Appeals' decision is an erroneous precedent that may be followed by other circuits; and (2) the exercise of federal jurisdiction in Section 11503 cases would disrupt the assessment, levy and collection of ad valorem taxes from railroad taxpayers in Georgia. Once again, these reasons are nothing more than a reargument of the State Board's contention that the Court of Appeals erred on the merits. Neither reason warrants the grant of certiorari.

It is the District Court's decision to abstain in this case that is in error—not the Court of Appeals' decision. This is borne out by the litigation history of Section 11503 since the date of the District Court's decision. Although the defense of abstention has been raised in numerous Section 11503 cases since this case was decided at the district court level, no district court has chosen to abstain in such cases. See *Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, 552 F.Supp. 1031, 1037-38 (D. Kan. 1982); *Atchison, Topeka & Santa Fe Ry.* v. *Arizona*, 559 F.Supp. 1237, 1248-49 (D. Ariz. 1983); *Southern Pacific Transportation Co.* v. *California*, No. C 81-4848 S.W. (N.D. Cal., filed September 1, 1982); *Trailer Train* v. *State Board of Tax Commissioners*, No. IP 82-45-C (S.D. Ind., filed Novem-

ber 3, 1982); *Burlington Northern R.R.* v. *Bair*, Civ. No. 83-100-A (S.D. Iowa, filed June 17, 1983); *Chesapeake and Ohio Railway Company, et al.* v. *Herschel H. Rose, III, Tax Commissioner, etc., et al.*, No. 82-2564 (S.D. W.Va., filed August 22, 1983).[1]

Contrary to the State Board's second contention, potential disruption to state finances is no ground for refusing to enforce congressional legislation which restricts a state's taxing power. In *Aloha Airlines* v. *Director of Taxation of Hawaii*, ___ U.S. ___, 104 S.Ct. 291 (1983), this Court dismissed as irrelevant the State of Hawaii's argument that the federal statute at issue in that case, 49 U.S.C. § 1513(a), interfered with Hawaii's system of taxation. This Court stated:

> We acknowledge that our interpretation of § 1513(a) may result in the disruption of state systems of taxation; we are, however, bound by the plain language of the statute. Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce, see *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979), and we trust that Congress will amend § 1513(a) if it concludes, upon reconsideration, that the preemptive sweep of the current version is too great.

104 S.Ct. at 295, n. 10.

As the Court of Appeals correctly recognized in this case, disruption of state finances is an inevitable consequence of congressional regulation of state taxation. Since the disruption to state finances that will result from the exercise of jurisdiction in Section 11503 cases was plainly anticipated and intended by Congress, such "dis-

---

[1] Copies of the unpublished opinions cited herein have been lodged with the Clerk of this Court.

ruption" cannot be used as a reason for declining the exercise of federal jurisdiction.

The essence of the State Board's argument is that the Court of Appeals' deference to congressional intent is novel, harmful, erroneous and in conflict with established case law. The railroads respectfully submit, however, that the Court of Appeals decision has none of these characteristics and is in complete accord with relevant decisions of this Court. The latest pronouncement by this Court regarding judicial deference to congressional intent in matters of jurisdiction is contained in *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), where this Court stated:

> (Respondents) argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts; would further the goal of comity and improve federal-state relations by postponing federal court review until after the state administrative agency had passed on the issue; and would enable the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision.
>
> As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent.

457 U.S. at 512-513. The same principles applied by this Court in *Patsy* to determine whether jurisdiction should be declined for failure to exhaust apply with equal force to determine whether a court should abstain. In all such instances congressional intent controls the exercise of jurisdiction.

CONCLUSION

The Petition simply restates arguments on the merits made before the Eleventh Circuit. Such arguments do not

present any ground for granting certiorari within Rule 17 of the Rules of this Court. The Petition should, therefore, be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

RESPONDENT, SOUTHERN RAILWAY COMPANY IS A WHOLLY-OWNED SUBSIDIARY OF NORFOLK SOUTHERN CORPORATION AND IS THE PARENT OF RESPONDENTS, ALABAMA GREAT SOUTHERN RAILROAD COMPANY, CENTRAL OF GEORGIA RAILROAD COMPANY, THE GEORGIA NORTHERN RAILWAY COMPANY, GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY, LIVE OAK, PERRY AND SOUTH GEORGIA RAILWAY COMPANY, AND TENNESSEE, ALABAMA AND GEORGIA RAILWAY COMPANY. THE SUBSIDIARIES OF RESPONDENTS WITH SECURITIES OUTSTANDING IN THE HANDS OF THE PUBLIC ARE:

Arrowood Southern Executive Park, Inc.
The Atlanta and Charlotte Air Line Railway Company
Atlantic and East Carolina Railway Company
Carolina and Northwestern Railway Company
Cincinnati, New Orleans and Texas Pacific Railway Company
Citico Realty Company
Danville and Western Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Mobile and Birmingham Railroad Company
New Orleans Terminal Company
The North Carolina Midland Railroad Company
St. Johns River Terminal Company
The South Western Rail Road Company
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Railway - Carolina Division
Southern Region Industrial Realty, Inc.
State University Railroad Company
Tennessee Railway Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Affiliates of Seaboard Coast Line Railroad Company and Louisville and Nashville Railroad Company

Name of Affiliate:

Atlanta and West Point Rail Road Company
CSX Corporation
James Center Development Company
Wesjax Development Company
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Florida Pipeline Corporation
Central Railroad Company of South Carolina, The
Central Transfer Railway and Storage Company
Chatham Terminal Company
Monon Coal Company, Inc.
Chicago and Western Indiana Railroad Company
First Georgia Development Corporation
Fruit Growers Express Company
Louisville, Henderson & St. Louis Railway Company
Nashville & Decatur Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company
Richmond, Fredericksburg and Potomac Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

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December 28, 1983

LODGING

Honorable Alexander L. Stevas
Clerk
United States Supreme Court
Washington, D. C. 20543

Re: State Board of Equalization of the State of Georgia, et al. v. Southern Railway Company, et al.
United States Supreme Court
No. 83-886

Dear Mr. Stevas:

I am lodging with you herewith copies of the following cases which are unpublished, and to which reference is made in the Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed simultaneously herewith:

1. Southern Pacific Transportation Co. v. California, No. C 81-4848 S.W. (N.D. Cal., filed September 1, 1982).

2. Trailer Train v. State Board of Tax Commissioners, No. IP 82-45-C (S.D. Ind., filed November 3, 1982).

3. Burlington Northern R. R. v. Bair, Civ. No. 83-100-A (S.D. Iowa, filed June 17, 1983).

4. Chesapeake and Ohio Railway Company, et al. v. Herschel H. Rose, III, Tax Commissioner, etc., et al., No. 82-2564 (S.D. W.Va., filed August 22, 1983).

Very truly yours,

Charles T. Zink

CTZ/tl
Enclosures

SEP 10 19??

RECEIVED
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SUPREME COURT, U.S.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, STATE BOARD OF EQUALIZATION, et al.,

Defendants.

No. C 81-4848 SW

ORDERS

In this action, plaintiff Southern Pacific Transportation Company ("Southern Pacific") and some of its subsidiaries challenge many aspects of defendant State Board of Equalization ("Board") valuation of its rail transportation property between 1979 and 1981. Southern Pacific's complaint involves a general challenge to California's taxation of rail transportation property under federal law and a series of specific attacks upon decisions by the Board to tax certain items of transportation property.

This matter came before the court on the Board's Motion for Abstention. After careful consideration of the briefs and arguments of counsel, the court hereby grants defendants' motion as to all claims except those involving challenges under the 4-R Act, 49 U.S.C. § 11503.

BACKGROUND

Plaintiff Southern Pacific and many of its subsidiaries are corporations authorized to do business in the State of California. For the tax years 1979-82, the Board purportedly valued plaintiffs' rail transportation property as of the lien date for each tax year. In making its assessments, the Board apparently determined a unitary true market value by combining the value of some of Southern Pacific's multistate transportation property, the value of the California single state rail transportation property of the other plaintiffs and the value of the property of the St. Louis Southwestern Railway Co. ("St. Louis"), a company substantially owned by Southern Pacific. The Board then allocated a portion of such combined value to California as the unitary value of plaintiffs' rail transportation property in this state.

In addition to challenging the allocation of some of the value of St. Louis' property to California, plaintiffs complain of several isolated decisions by the Board. For example, plaintiffs have attacked the Board's ruling that Southern Pacific's interest in the Los Angeles Passenger Terminal and in its passenger commute operation between San Francisco and San Jose should be separately assessed. Additionally, plaintiffs attack an escape assessment levied against plaintiffs for tax year 1981-82 purportedly to remedy an underassessment in 1979. Finally, Southern Pacific complains of the Board's decision to assess to it an executive aircraft owned by St. Louis and an aircraft leased from a third party.

In each of the tax years in question, Southern Pacific filed timely petitions for reassessment, for rescission of assessments and for abatement of penalties with the Board.

With respect to the challenges relevant hereto, the Board denied Southern Pacific's petitions. Following these denials, plaintiffs paid to the defendant counties each installment of the disputed taxes before such installment became delinquent. Plaintiffs then elected to file the instant lawsuit in this court.

In this action, plaintiffs seek injunctive and declaratory relief as to the state taxes involved herein. For their first legal theory, plaintiffs allege that the Board violated section 306 of the 4-R Act, 49 U.S.C. § 11503, which prohibits a state from levying or collecting a property tax "on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction." See Trailer Train Co. v. State Board of Equalization (II), 511 F. Supp. 553 (N.D. Cal. 1981). Specifically, plaintiffs allege that the Board's interpretation of Proposition 13 (now Cal. Const. art. XIIIA), its valuation of plaintiffs' transportation property for assessment purposes, its escape assessment, and the existence of a business inventory exemption for other taxpayers all constitute violations of the 4-R Act.

Plaintiffs also allege that the inclusion of St. Louis' property in Southern Pacific's unitary property violates the due process clause of the fourteenth amendment to the United States Constitution because it permits a state tax on property located outside of California. In addition, plaintiffs contend that these actions violate the commerce clause, U.S. Const. art. I, § 8, cl. 3, because of their effect on interstate commerce.

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Plaintiffs' final arguments arise as pendent claims brought under state law. Specifically, plaintiffs argue that the Board failed to comply with Article XIIIA of the California Constitution in assessing plaintiff's property by reference to its current true market value. Furthermore, plaintiff's argue that the Board failed to follow accepted appraisal methods which produced results in violation of California law. Finally, plaintiffs allege that the Board's assessment to Southern Pacific of the two aircraft was in violation of California Revenue and Taxation Code § 5362.

DISCUSSION

The Board now seeks to have this court abstain as to the plaintiffs' entire complaint. Abstention is a judicially created doctrine under which a federal court declines to excercise jurisdiction so that a state court or agency will have an opportunity to settle the question. The doctrine was federally generated and arises out of a desire to avoid unnecessary conflicts between the federal judiciary and state government. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

A. The 4-R Act Claims

The Board would have this court abstain as to the challenges to the state court taxes, not on the basis of a statutory prohibition, but rather out of a concern for comity. However, abstention from the exercise of federal jurisdiction "is the exception, not the rule." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). Thus, this court will not abstain unless the requirements formulated under that doctrine are strictly met under the particular claims under question.

The Board suggests that this court should abstain under the Burford category of abstention which takes its name from Burford v. Sun Oil Co., 319 U.S. 315 (1943). The purpose of Burford abstention is to avoid "federal intrusion into matters which are largely of local concern and which are within the special competence of local courts." International Brotherhood of Electrical Workers, 614 F.2d 206, 212 (9th Cir. 1980).

This court's analysis of the Burford doctrine must begin with the observation that this circuit has carefully limited its applicability to cases where (1) the state has chosen to concentrate suits to a particular court; (2) the federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and (3) federal review might disrupt state efforts to establish a coherent policy. Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374, 377 (9th Cir. 1982).

In the present case, it appears that a Burford dismissal is inappropriate.[1/] An examination of the applicable criteria reveals that this is not the kind of case which is largely local in character nor one in which federal intervention has been deemed unwarranted. In fact, the legislative history behind section 306 demonstrates a reasoned and well thought-out decision to permit federal intervention to remedy state discrimination. Congress clearly envisioned a federal forum to implement a national policy. S. Rep. No. 91-630, 91st Cong., 1st Sess.; The Atchison, Topeka & Santa Fe Railway Co. v. Lennen, Nos. 80-4172, 4173, 4176, 4181 (D. Kan. April 15, 1981

1/ It is also apparent that Pullman abstention is inappropria because no federal constitutional issue would be avoided by a state court determination of pertinent state law. Knudsen Corp. v. Nevada State Dairy Commission, supra.

Furthermore, Congress expressly found that federal judicial intervention was required in cases arising under this section because it created an exception to the state tax anti-injunction statute. 28 U.S.C. § 1341.

Accordingly, this court declines to abstain from deciding claims that arise under the 4-R Act. Abstention can only be justified under exceptional circumstances involving obvious intrusion into purely local affairs. In this case, where both Congressionally defined policy and judicial observations confirm the need for federal intervention, abstention is inappropriate.

B. Constitutional and State Law Claims

Defendant also seeks to have this court abstain as to the other aspects of plaintiffs' complaint. These claims, which raise federal constitutional questions, do implicate values of comity and state sovereignty while not evincing any countervailing federal interest such as in the 4-R Act claims. Therefore, in light of the sensitive and extremely local nature of these claims and the long-standing federal deference to state taxation cases, the court concludes that the requisite special circumstances warranting Pullman abstention are present here.[2/]

The Ninth Circuit has established three prerequisites to abstention under the Pullman doctrine:"(1)The complaint 'touches a sensitive area of social policy upon which the federal courts ougnt not to enter unless no alternative to its adjudication is open.' (2) 'Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.'

2/ Abstention under the Burford doctrine would be inappropri even as to these claims. There has been no showing that these suits are confined to a particular court. See, e.g., Isthmus Landowners Assoc., Inc. v. California, 601 F.2d 1087 (9th Cir. 1979); Santa Fe Land Improvement Co. v. Chula Vista 596 F.2d 838 (9th Cir. 1979).

(3) The possibly determinative issue of state law is doubtful." Canton v. Spokane School Dist., 498 F.2d 840, 845 (9th Cir. 1974)(quoting Pullman supra.).

As to the non-4-R Act claims in this case, the Canton requirements have been met. First, it is well-settled that absent other countervailing factors, [3/] federal courts should not interfere in the entirely local and sensitive area of the collection of state taxes. See Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298-99 (1943). This is particularly true when, as in the present case, the decisions being challenged involved isolated interpretations by a state agency of state tax regulations.

Second, it is entirely possible that a state court challenge, such as is involved in ITT World Transport v. San Francisco, Sup. Ct. No. 771 841, may well obviate the need to determine the constitutional questions in this litigation. A state court could well rule, on a variety of state grounds, that St. Louis' property should not have been included in the value of Southern Pacific's unitary property.

Finally, the question of whether the Board properly included St. Louis' property with Southern Pacific's is a question which turns on complicated and controversial interpretations of state law. It is unclear whether the assessment in the instant case on the basis of the definition of "operating unit" would be permitted under state law. This court, therefore, does not claim the ability to predict what a state court would do. See Santa Fe Land Improvement Co. v. Chula Vista, supra at 841.

Abstention in this case is necessary to avoid needless conflict with the administration by a state of its own

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3/ With respect to claims under the 4-R Act, federal intervention is not only warranted under federal law it is also necessary in order to remedy general discriminatory practices with a lengthy history.

affairs. Except as it concerns challenges approved by a statute with an express exemption from 28 U.S.C. § 1341, a suit attacking local tax decisions should be stayed pending resolution of any dispositive state law issues. Federal courts should not assume the functions of a State-wide court of tax appeals. Cf. Kent Island Joint Venture v. Smith, 452 F. Supp. 455, 464 (D. Md. 1978).

The court cannot hear plaintiffs' constitutional and state law challenges to California's attempt to tax their rail transportation property for an even more fundamental reason. It is now well-recognized that absent statutory exemption, [4/] 28 U.S.C. § 1341 restricts federal jurisdiction in cases involving state tax administration. Section 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Section 1341 has its roots in equity practice, in the principles of federalism and in recognition of a state's need to administer its own fiscal operations. Tully v. Griffin, Inc., 429 U.S. 68 (1976). Furthermore, this section has been held to apply to cases, such as the instant one, which seek declaratory relief or make federal constitutional challenges. Capitol Industries-EMI, Inc. v. Bennett, Nos. 80-4113, 80-4114 (9th Cir. July 22, 1981).

In the present case, plaintiffs' remedies in state court are adequate. Mandel v. Hutchinson, 494 F.2d 364, 367 (9th Cir. 1974); Pacific Gas & Electric Co. v. State Board of Equalization, 27 Cal. 3d 277 (1980). A single

4/ As indicated elsewhere in this memorandum, such an exemption exists for claims under the 4-R Act.

action against the Board in a target forum would accomplish the coordinated result plaintiffs desire. Accordingly, the court is without jurisdiction over the non-4-R Act claims and, they must be dismissed.

CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' claims which do not arise under section 306 of the 4-R Act, 49 U.S.C. § 11503, are dismissed.

IT IS FURTHER ORDERED that plaintiffs' claim as alleged in Paragraph 18C of their complaint is dismissed. See Trailer Train Co. v. State Board of Equalization (II), 538 F. Supp. 509 (N.D. Cal. 1982).

IT IS FURTHER ORDERED that plaintiffs' complaint against the individual defendants is dismissed.

IT IS SO ORDERED.

DATED: -1 SEP 1982

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TRAILER TRAIN COMPANY, RAILBOX COMPANY, RAILGON COMPANY, Plaintiffs, -vs- STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JOHN M. HUIE, GORDON E. McINTYRE, DURWOOD S. STRANG, As members of the State Board of Tax Commissioners of the State of Indiana, INDIANA DEPARTMENT OF STATE REVENUE, WILLIAM D. HAHN, As Commissioner of the Indiana Department of State Revenue, Defendants.	)	NO. IP 82-45-C

ENTRY

This case is before the Court on the defendants' motion to dismiss. For the reasons stated below, the motion is denied.

Background

The plaintiffs are Delaware corporations with their principal offices in Illinois. They are in the business of furnishing railroad cars to rail corporations. The defendants are the Indiana Board of Tax Commissioners and its members and the Indiana Department of State Revenue and its commissioner.

The defendants assessed the plaintiffs' property for an ad valorem property tax and collected a tax in 1981 pursuant to Ind. Code §§ 6-1.1-8-1 — 6-1.1-8-43 (1978 and Supp. 1982). The plaintiffs contend that the assessment violates section 306 of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (1982).

Under that section, a state may not assess rail transportation property used in interstate commerce at a rate higher than that used to assess other commercial and industrial property. Nor may it levy or collect a tax based on such an assessment.

The plaintiffs filed suit seeking an injunction directing the defendants to reduce their assessments of the plaintiffs' property and issue refunds based on the reduced assessments. They also requested a declaratory judgment that the defendants' 1981 assessment, levy and collection of the ad valorem tax on their property violated section 306. The defendants responded with a motion to dismiss, contending (1) that the plaintiffs had failed to allege that no adequate remedy at law existed and thus were not entitled to equitable relief, and (2) that the plaintiffs had not exhausted administrative remedies.

Discussion

I. Prerequisites to equitable relief

It is traditional that the availability of equitable relief depends on a showing that no adequate remedy at law exists and that irreparable harm would result without equitable intervention. These prerequisites do not apply in the case of section 306, however. This section has been interpreted to authorize district courts to grant injunctive relief in enforcing the section's substantive provisions. Atchison, T. & S.F. Ry. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981); Tennessee v. Louisville & N. R.R., 478 F.Supp. 199, 210 (M.D.Tenn. 1979), aff'd, 652 F.2d 59 (6th Cir. 1981), cert. denied, 454 U.S. 834, 102 S.Ct. 135, 70 L.Ed.2d 114 (1981). Where an injunction is authorized by statute it is not necessary for a plaintiff to establish the existence of the traditional equitable prerequisites. Id. The first ground for the defendants' motion to dismiss therefore does not apply in this instance. Accord, Ogilvie v. State Board of Tax Commissioners, No. IP 81-1203-C (S.D.Ind. May 4, 1982).

II. Exhaustion of administrative remedies

It is a general principle that recourse to the courts is not permitted if a party has not exhausted available administrative remedies. This doctrine is not jurisdictional, but discretionary. NLRB v. Industrial Union of Marine and Shipbuilding Workers Local 22, 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968).

In this case the exhaustion doctrine does not govern. Section 306 was enacted precisely because existing state administrative proceedings had proved cumbersome, and a quicker and more efficient remedy was needed for railroads seeking to alleviate disproportionate tax burdens. Clinchfield R. Co. v. Lynch, 527 F.Supp. 78 785 (E.D.N.C. 1981), citing S.Rep. No. 1483, 90th Cong., 2d Sess. 4-7 (1968); S.Rep. No. 630, 91st Cong., 1st Sess. 7-8 (1969). It would defeat this purpose to require prior resort to the very remedies which the statute was meant to supplant.

Further evidence of the intent of Congress to provide railroads a direct judicial avenue of redress is supplied by the language of subsection (c) of Section 306, 49 U.S.C. § 11503(c), which specifically precludes the application of the Tax Injunction Act, 28 U.S.C. § 1341 (1976). Section 1341 provides that district courts shall not enjoin state tax procedures where a "plain, speedy and efficient" state remedy is available. By declaring section 1341 specifically inapplicable in cases involving section 306, Congress manifested its intent that access to federal district court be open even in instances where state relief might also be available.

For these reasons it is clear that the exhaustion doctrine has no application to this case. Accordingly, the defendants' motion to dismiss is denied.

Dated this 3 day of November, 1982.

S. Hugh Dillin, Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
JUN 17 1983
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff,

vs.

GERALD D. BAIR, Director of the Department of Revenue of Iowa,

Defendant.

CIVIL NO. 83-100-A

ORDER

On March 22, 1983 defendant filed a motion to dismiss and an application for discretionay abstention. Plaintiff resisted these motions on April 14, 1983.

Defendant alleges that the proper parties have not been joined and thus the complaint should be dismissed. In its order of April 4, 1983 the Court determined that defendant was the proper party needed for the issues raised in the complaint. Defendant also alleges failure to state a claim upon which relief can be granted. Viewing the complaint in the light most favorable to plaintiff it appears the plaintiff has alleged facts which, if proven may allow relief to be granted pursuant to 49 U.S.C. § 11503.

Lastly, defendant alleges that the court lacks subject matter jurisdiction over this case. Clearly 49 U.S.C. § 11503 gives the Court jurisdiction to decide the questions raised here. The statute creates a cause of action against discrimination in the assessment of property taxes on rail transportation property.

The district courts of the United States are given jurisdiction without regard to the amount in controversy, citizenship of the parties or 28 U.S.C. § 1341. Thus court will not dismiss for lack of subject matter jurisdiction.

Abstention

Defendant requests that the Court apply the abstention doctrine to this case because of questions of state law raised in the complaint. The first type of abstention cited by defendant is the Pullman type. That doctrine requires federal courts to abstain from deciding constitutional questions which may be decided by state law. Clearly the complaint has not presented a constitutional challenge to the state law here, thus Pullman is inapplicable.

The other type of abstention is the so-called Burford type. This states that federal courts should abstain from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. However, the Congress intended that this type of question be determined in the federal courts. The State Tax Injunction Act, 28 U.S.C. § 3141, was made inapplicable to cases brought under 49 U.S.C. § 11503. Congress created this cause of action because it felt that state law remedies were inadequate. "Congress does not desire the federal courts to apply the court-created doctrine of abstention to claims under the act." Atchison, Topeka and Santa Fe Railway v. Arizona, No. CIV 81-1297, 81-1298 (D.C. Ariz, 1983). Accordingly, the Court will not apply the abstention doctine in this case.

IT IS THEREFORE ORDERED that defendant's Motion to Dismiss shall be and is hereby denied for the aforementioned reasons.

IT IS FURTHER ORDERED that the Court will not abstain in this case because of the inapplicability of the abstention doctrine to the facts present here.

Signed this 17th day of June, 1983.

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

THE CHESAPEAKE AND OHIO RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY; and WESTERN MARYLAND RAILWAY COMPANY,

Plaintiffs

v. Civil Action No. 82-2564

HERSCHEL H. ROSE, III, Tax Commissioner of the State Tax Department of West Virginia; and JON H. SNYDER, Director, Business Tax Division, State Tax Department of West Virginia,

Defendants

MEMORANDUM ORDER

This matter is before the court on the motion of defendants for judgment on the pleadings in the above-styled civil action. Such a motion may be appropriately granted only when the pleadings show that no material facts are in dispute and the moving party is entitled to judgment as a matter of law. King v. Gemini Food Service, Inc., 438 F. Supp. 964, 966 (E.D. Va. 1976), aff'd on other grounds, 562 F.2d 297 (4th Cir. 1977), cert. denied, 434 U.S. 1965 (1978). The facts presented in the pleadings and the inferences to be drawn therefrom are to be viewed most favorably to the non-moving party. Beal v. Missouri Pacific R. R. Corp., 312 U.S. 45 (1941).

I.

Plaintiffs in this action are three interstate common carriers by railroad who are each qualified to do and in fact do business in the State of West Virginia. Their complaint, which is brought under the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), Pub. L. No. 94-210, § 306, 90 Stat. 54 (1976), 49 U.S.C. § 11503,[1] seeks injunctive and declaratory relief against the defendants from what are alleged to be discriminatory state business taxes assessed for tax years 1973 through 1982 and expected to be assessed for future years. Defendants, who are responsible for the assessment and collection of business taxes levied on railroads

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[1] This court will follow the Fourth Circuit in referring to the original text of § 306 for purposes of analysis.

> In accordance with Pub. L. No. 95-473, 92 Stat. 1466 (1978), § 306 was moved from its original location at 49 U.S.C. § 26c and certain changes in language were made. The statute calling for recodification of the Interstate Commerce Act makes clear, however, that the changes in language were not to affect the substance of § 306. See also H. Rep. No. 1395, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 3009. As the parties, the district court, and other courts, see, e.g., Alabama Great Southern R.R. v. Eagerton, 663 F.2d 1036 (11th Cir. 1981); Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir. 1981), cert. denied, 454 U.S. 1086 (1981); but see State of Arizona v. Atchison, T. & S.F. R.R., 656 F.2d 398 (9th Cir. 1981), have done, we will refer to the original text of § 306 for purposes of analysis.

Clinchfield Railroad Company, et al. v. Lynch, 700 F.2d 126, 128 (4th Cir. 1983).

by the State of West Virginia, deny generally that the taxes at issue are discriminatory. As grounds for their motion for judgment on the pleadings, defendants contend that: (1) this court lacks jurisdiction over the subject matter of this action because plaintiffs have failed to exhaust their administrative remedies; (2) this court should abstain from exercising its jurisdiction; (3) the statute invoked does not apply to the taxes at issue; (4) plaintiffs have failed to state a claim upon which relief can be granted inasmuch as the taxes at issue are not discriminatory as a matter of law; and (5) the statute does not apply to tax years prior to 1979.

Plaintiffs have premised this action on section 306(1)(d) of the 4-R Act which provides that it is unlawful for a state to impose "any other tax which results in discriminatory treatment of a common carrier by railroad."[2] The "any other tax[es]" at issue

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[2] Section 306 of Pub. L. 94-210 as a whole provides that:

> Sec. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:
>
> "Sec. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

here are imposed under Article 12A of Title 11 of the West Virginia Code, specifically W. Va. Code § 11-12A-2, the Carrier Gross Income Tax, and § 11-12A-3, the Carrier Net Income Tax. The parties agree

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2 - cont'd

> "(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> "(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> "(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.
>
> "(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.
>
> "(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that --

that these taxes are levied on the transportation income of railroads, as well as other carriers, in lieu of (or are another form of) business and occupation taxes levied generally, at varying rates, on the

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2 - cont'd

> "(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;
>
> "(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;
>
> "(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;
>
> "(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and
>
> "(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such

gross incomes of other entities doing business within the state. See W. Va. Code § 11-13-1 et seq.; § 11-13-2d. Plaintiffs allege that the resulting tax burden on railroads is greater than that for other businesses.

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2 - cont'd

> transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.
>
> "(3) As used in this section, the term --
>
> "(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;
>
> "(b) 'assessment jurisdiction' means a geographic area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;
>
> "(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and
>
> "(d) 'transportation property' means transportation property, as defined in regulations of

II.

Defendants' argument that this court should not take jurisdiction over this complaint because plaintiffs have failed to exhaust

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2 - cont'd

> the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

The text of 49 U.S.C. § 11503, see note 1, supra, reads as follows:

> § 11503. Tax discrimination against rail transportation property
>
> (a) In this section --
>
> (1) "assessment" means valuation for a property tax levied by a taxing district.
>
> (2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.
>
> (3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
>
> (4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.
>
> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

administrative remedies available to them by state statute contradicts the language of § 306(2) which states that:

> Notwithstanding any provision of section 1341 of title 28, United States Code, or of the

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2 - cont'd

> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
>
> (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial

> constitution or laws of any State, the district courts of the United States shall have jurisdiction . . . to grant such . . . relief . . . as may be necessary to prevent, restrain or terminate any acts in violation of this section."

28 U.S.C. § 1341 generally prohibits federal courts from enjoining the collection of state taxes "where a plain, speedy and efficient remedy may be had in the courts of such State." The clear message

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2 - cont'd

> and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section --
>
> > (1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and
> >
> > (2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.
>
> Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1445.

of § 306(2) is that Congress intended railroads to be able to seek an initial remedy under the federal statute without having to resort to state proceedings which might otherwise be available to them. See Clinchfield Railroad Co. v. Lynch, 527 F. Supp. 784, 785 (E.D.N.C. 1981) (and legislative history cited therein), aff'd 700 F.2d 126 (4th Cir. 1983).

The language of § 306(2) also suggests that a federal court should be chary of invoking the doctrine of abstention in a case brought under that statute. Abstention would have the effect of sending plaintiffs to state court, a route § 306(2) plainly indicates plaintiffs are not required to travel. Federal courts have a duty to adjudicate cases properly before them unless a significant interest such as "state-federal comity or . . . avoidance of constitutional decisions" would be clearly served by deference to state court proceedings under the judicially created doctrines of abstention and equitable restraint. Moses H. Cone Memorial Hospital v. Mercury Construction Co., 103 S. Ct. 926, 936 (1983), citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976).

Congress, in enacting § 306, has characterized the federal interests as paramount. See State of Arizona v. Atchison, Topeka and Santa Fe Railroad, 656 F.2d 398 (9th Cir. 1981). Here, as in Colorado River, supra, there is no federal constitutional issue which

might be mooted by a state court interpretation of state law. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). A state's tax structure is certainly a matter of state concern. See, e.g., Louisiana Light and Power Co. v. Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943). This case, however, does not require the court to interpret how the state intended the taxes at issue to be applied to the plaintiff railroads or to other businesses. The application is clear. See Western Maryland Railway Co. v. Goodwin, ___ W. Va. ___, 282 S.E.2d 240 (1981). Review of these taxes by this court may indeed disrupt state policy evidenced by them. See Burford, supra. Such disruption, however, is precisely the intent of the statute. This same principle negates the rationale for application of the doctrine of equitable restraint as invoked in Younger v. Harris, 401 U.S. 37 (1971), and its progeny.[3] See Juidice v. Vail, 430 U.S. 327, 333-37 (1977). See also Colorado River Water Cons. District v. United States, 424 U.S. at 818. The court recognizes that abstention has been applied in some 4-R Act cases, see e.g., Missouri Pacific Railroad Co. v. Tax Division of the Arkansas Public Service Comm., 504 F. Supp. 907 (E.D. Ark. 1980), but is not persuaded by the analysis found there.

Defendants' contention that the scope of § 306 is limited to property taxes or taxes in lieu of property taxes and accordingly

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[3] It is not clear from the pleadings whether there are any current state proceedings with respect to plaintiffs' tax obligations.

does not reach the taxes at issue here is not untenable, but is not supported by the holdings of those courts of appeals which have addressed themselves to this issue. In Alabama Great Southern Railroad v. Eagerton, 663 F.2d 1036 (11th Cir. 1981), the state tax alleged to be discriminatory in its treatment of railroads was a license or privilege tax on the gross receipts of the railroads' intrastate business, a tax similar to the carrier taxes levied by West Virginia. The Eleventh Circuit found the words "any other tax" of § 306(1)(d) to be plain in their import: "It would be difficult to imagine statutory language that would be less needful of construction than the 'any other' language used here." 663 F.2d at 1040. Describing § 306(1)(d) as a "catchall provision," the court held that it was intended to reach any form of discriminatory taxation, not just property taxation as argued by the appellees. It noted that prior to passage of the 4-R Act, states could constitutionally, under the Equal Protection Clause of the Fourteenth Amendment, as well as under state constitutions, classify railroads differently from other taxpayers as long as the classification was rational. Under the Commerce Clause, however, Congress could prohibit any form of differential treatment of railroads as taxpayers. See P.L. 94-210, § 306(1); State of Arizona v. Atchison, Topeka and Santa Fe Railroad Company, 656 F.2d at 407.

The court in Eagerton relied on the holding in Ogilvie v. State Board of Equalization of the State of North Dakota, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981), in which the Eighth Circuit stated that the "purpose [of § 306, as revealed in its legislative history] was to prevent tax discrimination against railroads in any form whatsoever." 657 F.2d at 210 (emphasis supplied). In Ogilvie, North Dakota had argued that its tax system was equitable as between railroads and other commercial and industrial taxpayers because locally assessed businesses paid an annual business privilege tax in lieu of the personal property tax imposed on railroads and other centrally assessed businesses. The circuit court rejected this argument with the language quoted above. While the Ogilvie holding could be confined to taxes in lieu of property taxes, the Eleventh Circuit did not so construe it. Moreover, Ogilvie undercuts defendants' argument that § 306 is limited to property taxes because of § 306(2)(c) which denies relief unless there is at least a 5% disparity in assessed-to-true market value ratios as between transportation property and other commercial and industrial property. The Ninth Circuit has held that a literal reading of § 306(2)(c) would lead to an "absurd result," undermining Congressional recognition that discrimination could result from differential tax rates as well as valuation practices and Congress' intent to

provide a remedy for victims of discrimination. Trailer Train Co. v. State Board of Equalization, 697 F.2d 860 (9th Cir. 1983).

For purposes of this motion for judgment on the pleadings, the court must accept plaintiff's allegations of ultimate fact that the business and occupation tax system of West Virginia results in discriminatory treatment of railroads. See Beal v. Missouri and Pacific R.R. Corp., supra; 5 Wright and Miller, Federal Practice and Procedure, § 1368, 690-93 (1960). Further factual development is necessary to ascertain whether or not the carrier income taxes are discriminatory and, if so, the precise nature and extent of the discrimination. Also to be resolved is the question of whether the entire tax structure to which railroads and other commercial and industrial businesses are subject should be considered or only the carrier income and business and occupation taxes. See Alabama Great Southern Railroad Co, v. Eagerton, 663 F.2d at 1041. Defendants' argument that plaintiffs have failed to state a claim upon which relief can be granted because as a matter of law the carrier income tax is not discriminatory must therefore be rejected.

Further factual development is also necessary to properly assess defendants' fifth ground for judgment on the pleadings -- that the statute does not apply to tax years prior to the effective

date of the Act, February 5, 1979. Pub. L. 94-210, § 306(2)(b); 49 U.S.C. § 11503, Historical and Revision Notes. In their complaint, plaintiffs allege that notices of deficiency assessments of the carrier income tax were issued in September of 1982 against C & O and B & O for calendar years 1973 through 1976. C & O has also filed a claim, in June of 1982, for a refund of carrier net income taxes for the 1974, 1975, 1976, 1979 and 1980 calendar years.

In Trailer Train Co. v. State Board of Equalization, supra, the California State Board of Equalization recalculated, after the effective date of the Act, ad valorem taxes on private railroad cars, at a rate which was different from that at which the tax was originally levied and paid and which was allegedly discriminatory. When the railroads brought suit under 49 U.S.C. § 11503, the Board argued that the statute did not apply inasmuch as the additional tax was intended to correct a miscalculation of taxes owed on assessed values which had not changed. The Trailer Train court was not persuaded by this relation-back argument. It noted that § 11503(b), § 306(1)(a), prohibited not only discriminatory assessments but also collections based on discriminatory rates. It found that:

> Congress' purpose in postponing the effective date of § 11503 was to afford the states sufficient time to comply with the statute's prohibition against discriminatory tax treatment of railroad property. H. R. Rep. No.

> 725, 94th Cong., 1st Sess. 76 (1975). It was not to provide statues with an additional opportunity to impose and collect discriminatory taxes.

697 F.2d at 865.

It is not clear from the facts as pleaded here whether the deficiencies noticed are attributable to discriminatory tax rates. Moreover, in Trailer Train, a different rate was used for the recalculation; plaintiffs in this case have not asserted that the deficiencies resulted from use of a different rate than previously applied to the earlier tax years. It is also questionable whether the rationale of Trailer Train would reach tax years prior to 1976. See Trailer Train v. State Board of Equalization, 697 F.2d at 865, n.5. Additionally, § 306(1)(d) speaks to the "imposition of any other tax," not to "levy or collection," the language used in § 306(1)(b) and (c) which were the subsections invoked in Trailer Train.

III.

For the reasons stated above, it is ORDERED that defendants' motion for judgment on the pleadings be, and it hereby is, denied.

The Clerk is directed to forward certified copies of this order to all counsel of record.

DATED: August 22, 1983

JOHN T. COPENHAVER, JR.
United States District Judge

A TRUE COPY, Certified this
22nd day of Aug, 1983
RONALD D. LAWSON, CLERK
BY Ruth Blazek
DEPUTY

Office - Supreme Court, U.S.
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FEB 23 1984
ALEXANDER L. STEVAS
CLERK

No. 83-886

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE BOARD OF EQUALIZATION OF GEORGIA, ET AL., PETITIONERS

v.

SOUTHERN RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a district court is free to exercise its equitable discretion to abstain under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), even though Congress has specifically determined that a federal forum should be available to enforce a federal statutory right.

1. Respondent railroads brought this action in the United States District Court for the Northern District of Georgia to enjoin the assessment of their property for the 1979 tax year by petitioners, the State Board of Equalization of Georgia and its members. Relying on a sales ratio study prepared by the Georgia Department of Audits, the railroads alleged that the ratio of assessed value to true market value of their property exceeded by at least five percent the ratio of assessed value to true market value of other commercial and industrial property in Georgia, in violation

of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54, 49 U.S.C. (Supp. V) 11503 (Section 11503) (Pet. App. 36a-39a). Section 11503 prohibits the discriminatory taxation of railroad property by states and establishes federal jurisdiction in the district courts to enjoin violations notwithstanding the Tax Injunction Act, 28 U.S.C. 1341. The United States intervened pursuant to 28 U.S.C. 2403(a) because petitioners raised as a defense that Section 11503 usurps powers reserved to the states and thus violates the Tenth Amendment. Pet. App. 2a-3a.

Without ruling on the constitutionality of Section 11503 or reaching the merits of the railroads' complaint, the district court "exercise[d] * * * its discretion * * * [to] abstain" (Pet. App. 33a) under *Burford* v. *Sun Oil Co., supra*. The court concluded that the issue raised by the railroads "is clearly seen as one more properly considered by the state courts rather than the federal courts" (Pet. App. 26a). Accordingly, it dismissed the action.

On appeal by the railroads and the United States, the court of appeals reversed. It found that "Congress meant unconditionally to ensure a federal forum for section 11503 claims" (Pet. App. 9a). As the court of appeals noted, Congress, after "thoroughly consider[ing] the effects the Act would have on state taxation policies and practices * * *[,] concluded that both a federal remedy and a federal forum were necessary to further the strong national policy of protecting interstate commerce from the disruptive effects of discriminatory state and local taxation of railroad property" (*id.* at 13a-14a). And, to assure the availability of a federal forum, "Congress provided in section 11503 a specific exemption to the Tax Injunction Act," which would otherwise bar federal court suits to enjoin state taxes (Pet. App. 12a). Because "[a]bstention here * * * would rob the jurisdictional grant of section 11503 of all meaning" (*id.* at

15a), the court of appeals held that the district court had abused its discretion in abstaining, and it remanded the case for consideration on the merits (*id.* at 17a).

2. The court of appeals correctly construed Section 11503 to ensure that federal district courts would be available for suits by railroads to enjoin discriminatory state taxation. Moreover, as petitioners acknowledge (Pet. 14, 15, 17), no conflict exists on the construction of Section 11503. See also Southern Ry. Br. in Opp. 8-9. Accordingly, further review is not warranted.

a. The court of appeals carefully reviewed the extensive legislative history of Section 11503 (Pet. App. 12a-15a). Based on that review, the court correctly concluded that Congress, while aware of "the effects the Act would have on state taxation policies and practices" (*id.* at 13a), determined that "strong federal policies demanded a federal forum as well as a federal substantive remedy" (*id.* at 12a) and therefore "meant to guarantee a federal forum for railroad suits" (*id.* at 14a). See, *e.g.*, S. Rep. 1483, 90th Cong., 2d Sess. 6-7 (1968). Petitioners have pointed (Pet. 15-17) to nothing in the text or history of the Act that contradicts the court of appeals' conclusion. Nor is there any merit to their suggestion (Pet. 16-17) that Section 11503 is limited to cases involving de jure discrimination against railroads or ineffective and unreasonable state remedies. See Pet. App. 9a, 12a-13a; S. Conf. Rep. 94-595, 94th Cong., 2d Sess. 166 (1976).

Moreover, to guarantee the necessary federal forum, Congress specifically provided in Section 11503 for district court jurisdiction "[n]otwithstanding any provision of [the Tax Injunction Act] or of the constitution or laws of any State" (Pet. App. 37a). Because the Tax Injunction Act and equitable abstention in the state tax area reflect similar concerns of comity and federalism (see *California* v. *Grace*

Brethren Church, 457 U.S. 393, 408-409, 411, 413 n.29, 417 (1982); *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 103, 105, 110, 116 n.8 (1981); *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 522 (1981); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 470 (1976)), we perceive no reason, and petitioners have cited none, why Congress would have enacted an exception to the Tax Injunction Act in Section 11503 and yet intended to allow district judges to render a federal forum unavailable under the parallel doctrine of abstention. As the court of appeals correctly recognized, abstention "would rob the jurisdictional grant of section 11503 of all meaning" (Pet. App. 15a) and would interfere with "accomplish[ment of the congressional] purpose * * * to guarantee a federal forum for railroad suits" (*id.* at 14a). Since Congress has already struck the balance between federal and state interests here, there is no room for a district court to reweigh the same factors and reach a contrary conclusion under the rubric of equitable abstention.[1]

b. Petitioners contend (Pet. 7, 9 n.3, 10, 13, 14), however, that federal courts should be free to exercise their discretion to abstain even though Congress has required that a federal forum be available to adjudicate federal statutory rights. In their view, "comity and federalism are always to be considered in *Burford* abstention cases, irrespective of whether the statutory indications favor or disfavor abstention" (Pet. 10). We are aware of no support for this broad assertion, and the court of appeals correctly rejected it (Pet. App. 14a, 16a n.14). In Section 11503, Congress has affirmatively

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[1] This conclusion is reinforced by petitioners' emphasis (Pet. 16-17) on the adequacy of the railroads' remedy under state law. In effect, petitioners seek to impose, under principles of equitable abstention, the "plain, speedy and efficient" standard of the Tax Injunction Act — a standard that Congress specifically provided would not be applicable in Section 11503 suits.

determined that, as a matter of national policy, a federal forum must be available for suits by railroads to enforce their statutory protection against discriminatory state taxes. The Court's analysis of the exhaustion issue in *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 501-502, 513 (1982) (footnote omitted), is equally pertinent here:

> Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.
>
> * * * * *
>
> [P]olicy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent.

Thus, district courts are not free to disregard Congress's affirmative determination that the availability of a federal forum is necessary to further national policy.

Contrary to petitioners' characterization (Pet. 8), the court of appeals did not hold that "if Congress intended to offer a suitor a choice of forum then a district court may not decline to exercise its jurisdiction." Indeed, the court below expressly stated that a federal court "is not bound to * * * hear any case for which Congress has provided jurisdiction" (Pet. App. 11a n.12), and it discussed a number of decisions that recognize a court's discretion to abstain from exercising jurisdiction (*id.* at 10a-11a). The court's holding is confined to Section 11503, in which Congress specifically

determined that railroads should have access to a federal forum to enjoin discriminatory state taxation notwithstanding any impact on state tax policies and practices (see Pet. App. 12a, 13a).

c. Petitioners acknowledge (Pet. 10) that this consideration — Congress's affirmative intention in Section 11503 to make available a federal forum for enforcing a federal statutory right regardless of the effect federal adjudication might have on the state tax system — distinguishes this case from *Burford* v. *Sun Oil Co., supra,* and *Fair Assessment in Real Estate Ass'n* v. *McNary, supra,* upon which they rely.[2] They contend, however, that the decision below "conflicts in principle" (Pet. 10) with *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951). This contention is without merit. In that case, the Court rejected the argument that the inapplicability of the Johnson Act (28 U.S.C. 1342), which prohibits federal suits to enjoin state rate orders for public utilities, established by negative implication a congressional mandate that district courts should adjudicate the validity of other state public utility orders. Here, in contrast, it is clear that Congress has affirmatively and specifically concluded that a federal forum is

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[2]In *Burford,* district court jurisdiction was invoked on grounds of diversity of citizenship and federal question review of a due process claim (319 U.S. at 317); in those jurisdictional statutes Congress had not, as here, made a determination of the need for a federal forum to enforce a particular statutory scheme or considered and rejected the argument that federal judicial proceedings would be an unwarranted intrusion on the states. *Fair Assessment,* as the court of appeals correctly understood (Pet. App. 14a-15a), required this Court to reconcile two "conflicting" and "divergent" lines of authority concerning 42 U.S.C. (Supp. V) 1983, on the one hand, and the Tax Injunction Act and principles of comity, on the other (454 U.S. at 101, 105); the Court found that Congress had not addressed or resolved the question and held that, in the absence of a congressional determination, principles of comity were there controlling.

to be available in suits by railroads under Section 11503. Nothing in *Alabama Public Service Comm'n* suggests that federal courts should not give effect to that congressional intent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

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SOUTHERN RAILWAY COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

1. THE STATE BOARD'S STATEMENT OF THE CASE IS ACCURATE.

The State Board stands by its statement, characterized as erroneous by the railroads, that "Each railroad agreed that the State Board had jurisdiction to grant relief based upon § 306, and actively litigated its § 306 cause of action before the State Board." Petition 3. The railroads' claim is that they simply reserved their § 306 claim to prevent its waiver while they exhausted their administrative remedies under State law, R.R. Brief 2-3, but this is inconsistent with the record and the conclusions of both the District Court and the Court of Appeals. This dispute is not academic: The District Court concluded that the railroads' conduct in proceeding before the State Board was a factor worthy of consideration in deciding to abstain. Pet. App. 32a.

The record on appeal will show that each railroad raised § 306, equally with causes of action based upon State law, as a basis for its appeal to the State Board. R. 614-33.[1] Each railroad, through counsel, signed a stipulation not referring specifically to § 306 but effectively incorporating by reference the grounds set forth in the appeals. R. 635.[2] Each railroad in its brief to the Board specifically relied upon § 306. R. 735.[3] The railroads argued that they had proved their § 306 case and "are therefore entitled to relief under the provisions of the 4-R Act as well as relief under the provisions of Georgia law." R. 736.

These actions plainly go beyond reserving the § 306 cause of action for a later proceeding in U.S. District Court and both the hearing officer, R. 682-83, and the State Board, *see* R. 759, decided the § 306 claim on the merits. Moreover, the District Court necessarily concluded that the § 306 claim was presented on the merits to the State Board, because it concluded that the § 306 issue would be encompassed within any appeal to State Court. Pet. App. 33a. Finally, the Court of Appeals necessarily concluded that the § 306 claim was presented on the merits to the State Board, because it assumed that the State Board order, had it been entered, would have

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[1] *E.g.*, "Such assessment is contrary to the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C.A. Section 11503. *** For these and other reasons which will be presented at the requested hearing, taxpayer respectfully appeals the proposed assessed valuation . . . ." R. 632-33.

[2] "The railroads have timely filed their appeals to this Board. This Board has jurisdiction to hear evidence on the issues and to grant relief, redetermine values and to equalize assessment percentages, if warranted by the evidence."

[3] "[T]he railroads did in their appeal to the Board, in the alternative, rely upon the additional equalization rights conferred by act of Congress under 49 U.S.C. § 11503 (4-R Act)."

been *res judicata* and binding upon the District Court. Pet. App. 5a, n. 7.

It is fair to say that the railroads are attempting to gain two trials on a single cause of action. The District Court correctly concluded that the railroads' conduct in this regard is a factor which is worthy of consideration in deciding to abstain. Pet. App. 32a.

2. RESPONDENTS' PRINCIPAL ARGUMENT IS CONTRADICTED BY CONGRESS' VESTING OF JURISDICTION OF § 306 CASES CONCURRENTLY IN STATE AND FEDERAL COURT.

Both the railroads and the United States discuss § 306 as though Congress specifically intended that § 306 cases be brought in federal court. Not only is such an intent evidenced nowhere in the legislative history, it is affirmatively contradicted by Congress' vesting of jurisdiction of § 306 cases concurrently in state and federal court. No special congressional preference for a federal adjudication can plausibly be maintained in the absence of a grant of exclusive jurisdiction to U.S. district courts.[4]

Admittedly, a Congress holding no special preference of its own for federal court adjudication could nevertheless intend to offer plaintiffs the option of selecting a federal

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[4] The propriety of abstention in an exclusive jurisdiction case has never been decided by this Court and is not presented here. Several lower courts have abstained in exclusive jurisdiction cases, *see* Note, "Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation," 67 Cornell L. Rev. 219 (1981), even though the argument against abstention was immeasurably stronger in such cases than it is in the case at bar.

forum.[5] To argue that such an intent forbids abstention proves too much, however, because nearly every federal cause of action includes at least concurrent district court jurisdiction.[6] To accept Respondents' position is to adopt Justice Frankfurter's dissent in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and consign abstention to the dustbin in nearly every case.

Moreover, it must be remembered that all railroads in this case voluntarily raised and vigorously litigated their § 306 cause of action in their six day trial before the hearing officer. *Supra* at 1-3. The United States does not mention this aspect of the case, and the State Board does not believe that the United States means to endorse the railroads' claimed right to two trials on a single cause of action. Even assuming that Congress intended for railroads to have an absolute choice of forum in § 306 cases, the railroads here made their choice in 1979 and should not be allowed to change it now.

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[5] Such an intent need not be to offer an unconditional choice to all plaintiffs in all cases. The legislative history of § 306 suggests that district court jurisdiction was offered as an escape from the multiple suit requirements imposed by some states. S. Rep. No. 92-1085 at 8. Georgia imposes no such requirement.

[6] Respondents assert that the district court decision "would rob the jurisdictional grant of Section 11503 of all meaning." R.R. Brief 6; U.S. Brief 4, but the district court order makes it clear that, in the opinion of the district court, abstention would be inappropriate in § 306 cases filed in most other states. Pet. App. 31a. The district court's careful and correct application of *Burford* principles protects both the congressional purpose and the comity principle, and is not fairly open to Respondents' criticism.

For the reasons stated herein and in the Petition, we respectfully request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Reply Brief upon counsel for all parties who are separately represented, pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, by mailing three copies to each in envelopes addressed to:

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with first-class postage prepaid. All parties required to be served have been served.

This _____ day of _____, 1984.

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